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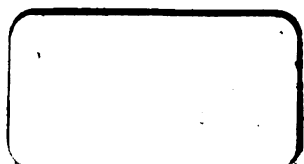
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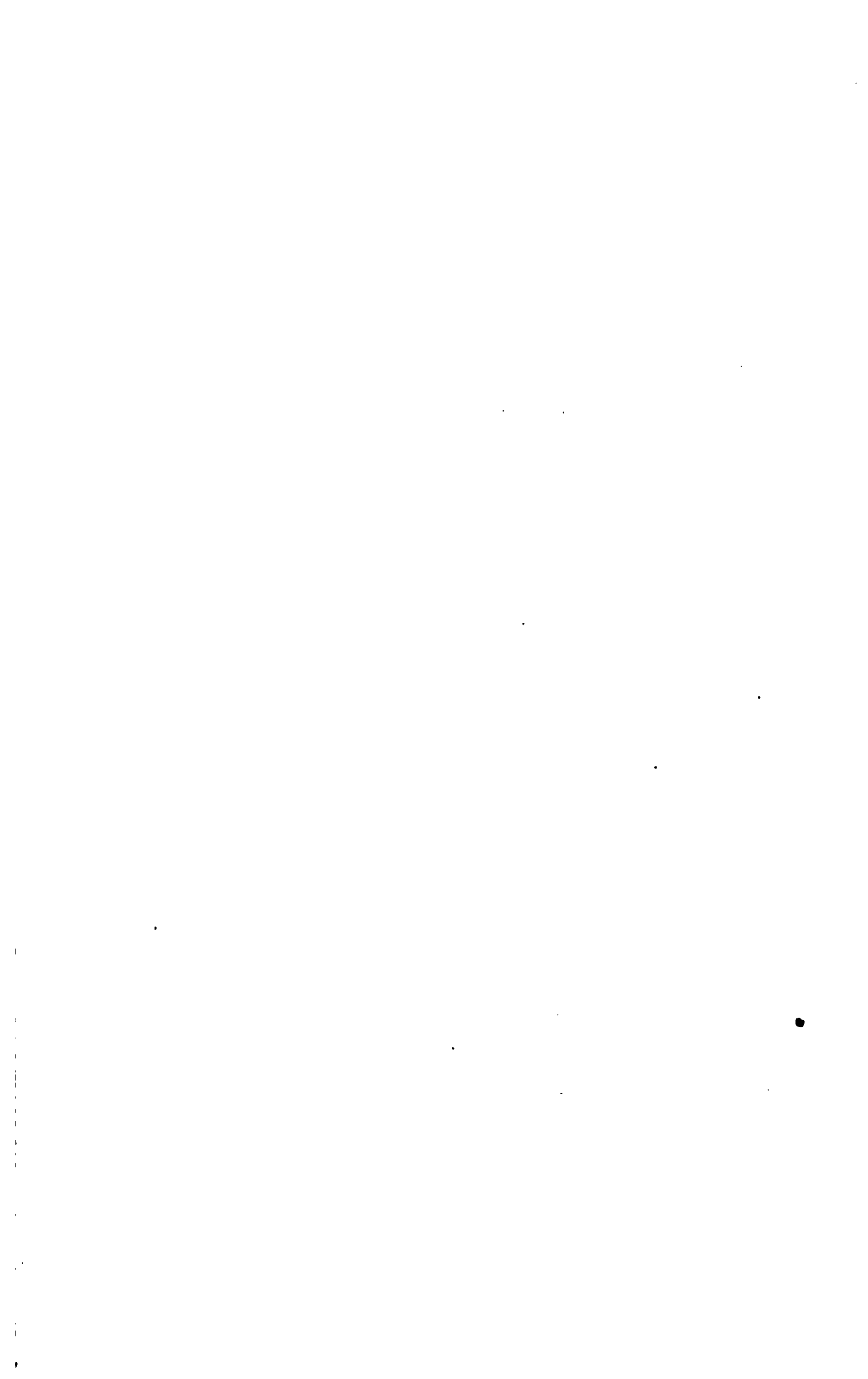
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JA
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REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Courts of Common Pleas

AND

Exchequer Chamber,

WITH

TABLES OF THE NAMES OF THE CASES AND PRINCIPAL MATTERS.

BY

JOHN BAYLY MOORE, Esq., OF THE INNER TEMPLE,

AND

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BARRISTER AT LAW.

VOL. V.

CONTAINING THE CASES FROM HILARY TERM, 1 WILL. IV. 1831,

TO

TRINITY TERM, 1 WILL. IV. 1831, BOTH INCLUSIVE.

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J U D G E S

OF THE

COURT OF COMMON PLEAS,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

**The Right Hon. Sir NICHOLAS CONYNTHAM TINDAL,
Knt., Lord Chief Justice.**

The Hon. Sir JAMES ALLAN PARK, Knt.

The Hon. Sir STEPHEN GASELEE, Knt.

The Hon. Sir JOHN BARNARD BOSANQUET, Knt.

The Hon. Sir EDWARD HALL ALDERSON, Knt.

ERRATUM.

Page 252, lines 18 & 24, for "Lord Egremont," read "Lord Egmont."

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CASES

ARGUED AND DETERMINED

IN THE

Courts of Common Pleas

AND

Exchequer Chamber,

IN HILARY TERM,

IN THE FIRST YEAR OF THE REIGN OF WILLIAM IV.

MEMORANDA.

1831.

MR. Serjeant *Spankie* and Mr. Serjeant *Jones*, having, in the course of the last vacation, respectively received patents of precedence, took their seats accordingly in front of the bar, on the first day of this term.

During the earlier part of the term, Mr. Justice *Park* and Mr. Justice *Alderson* were absent, being engaged on the Special Commissions issued into *Hampshire* and *Berkshire* for the trial of persons charged with rioting, burning farming-stock, and breaking machinery.

1831.

Monday,
Jan. 13th.

7 Binf. 237

BULL v. MARGARET PRICE.

The plaintiff, a surveyor, was retained by the defendant, to negotiate with the Commissioners of Woods and Forests for the sale to them of certain premises of the defendant, for which he was to receive a commission of 2l. per cent.

"on the sum which might be obtained, either by private treaty, arbitration, or trial by jury." Private treaty proving unavailing, a Jury was impanelled, by whom the value of the property was assessed at 4,000l.; but, in consequence of a defect in the defendant's title, arising out of an annuity charged upon part of the premises, which the commissioners required the defendant to buy off, the money was not paid to her, but was placed in the hands of the Accountant-General, to await the adjustment of the difference. The plaintiff was not previously aware of the existence of this charge:—*Held*, that he was nevertheless not entitled to his commission until the money awarded was *actually received* by the defendant.

THIS was an action of *assumpsit*, brought by the plaintiff, a surveyor, to recover from the defendant, the late proprietress of certain freehold premises in *Vine Street*, St. *Martin-in-the-Fields*, and also of an hotel called the *Key*, in *Chandos Street*, *Covent Garden*, a sum of 80l., claimed by him as due for commission and reward for negotiating on her behalf, with His Majesty's Commissioners of Woods and Forests, for the sale of the above-mentioned premises, in pursuance of the *Charing-Cross* improvement act (a).

The first count of the declaration stated—That, on the 24th *October*, 1828, in consideration that the plaintiff, at the special instance and request of the defendant, undertook to negotiate, on her behalf, with the Commissioners of his Majesty's Woods and Forests, for the sale of certain freehold ground and messuages of the defendant, and of her reversionary interest in and to the increased value of the same premises, and also of the benefit which she the defendant was entitled to by virtue of a clause in the lease held by one *Stephen Armstrong*, of one of the said messuages, empowering the defendant to give the said commissioners possession of the said last-mentioned messuage, without the purchase of the good-will of the business of the said *Stephen Armstrong*, and of the unexpired term of his lease, she, the defendant, undertook and promised the plaintiff to pay to him a certain commission and reward, after the rate of 2l. per cent. on the sum which might be obtained, either by private treaty, arbitration, or trial by jury, as might be decided upon, for the trouble and exertions of him the plaintiff on behalf of the defendant;

(a) 7 Geo. 4, c. 77.

and that the plaintiff, confiding in the said promise and undertaking of the defendant, did negotiate with the said commissioners on behalf of the defendant for the sale of the premises aforesaid, and of the said interest and benefit of the said defendant therein; and that, on the 28th November, 1829, the sum of 4,000*l.* was obtained by the defendant for the said premises, by means of a certain trial by jury duly impannelled to ascertain the value of the same premises, and of the interest of the defendant therein: By reason whereof, and according to the true intent and meaning of the said promise and undertaking of the defendant, so made in manner aforesaid, she the defendant became liable to pay to the plaintiff, for his trouble and exertions on behalf of the defendant in and about the matters aforesaid, the sum of 80*l.*, the same being at and after the rate of 2*l.* per cent. on the said sum of 4,000*l.* so obtained by the plaintiff, in manner aforesaid; whereof the defendant had notice.

The declaration also contained counts for work and labour as a surveyor, for work and labour and materials, and the common money counts, and an account stated.

The defendant pleaded the general issue.

The cause was tried before Lord Chief Justice *Tindal*, at the Sittings at *Westminster*, after last *Easter Term*.

The retainer under which the plaintiff had acted was as follows:—

“ 24th October, 1828.

“ Sir,—I hereby empower you to negotiate with the Commissioners of Woods and Forests for the sale of my freehold ground in *Chandos Street*, and *Vine Street*, *St. Martin-in-the-Fields*, and the messuages Nos. 22 and 23, *Chandos Street*, thereon, and for my reversionary interest to the increased value of the same; and also for the benefit which I am entitled to by a clause in the lease held by *Mr. Armstrong*, of No. 23, empowering me to give the commissioners possession without the purchase of the

1831.

BULL
&
PRICE.

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good-will of his business and the unexpired term of his lease. And I hereby undertake to pay you two pounds *per cent.* on the sum *which may be obtained*, either by private treaty, arbitration, or trial by jury, as may be decided upon, for your trouble and exertions on my behalf.

“*S. T. Bull*, Esq.
Surveyor, &c.”

Margaret Price.”

In pursuance of the above retainer, the plaintiff surveyed and valued the premises, and entered into a negotiation for the sale of them with the commissioners, and eventually succeeded in procuring from them an offer of 4,600*l.* The defendant not chusing to accept that sum, an inquisition was held (a), whereon the Jury assessed the value of the defendant's interest in the premises at 4,000*l.* An abstract of the defendant's title was afterwards delivered to the commissioners. A delay, however, arose in the payment of the money, in consequence of a defect in the defendant's title; the premises being charged with an annuity of 80*l.*, and the commissioners requiring the annuitant to join in the conveyance to them. The money was therefore paid into the hands of the Accountant-General, to await the adjustment of the difference. The plaintiff in the meantime brought this action to recover the stipulated remuneration for his services.

On the part of the defendant, it was contended that the plaintiff's claim was premature, inasmuch as the money awarded to her had not been *obtained*.

On the other hand, it was insisted that the fair meaning of the agreement was, that the plaintiff should receive his commission when the defendant's right was ascertained; and that he was not bound to wait until she might chuse to avail herself of her right, and receive the money: particu-

(a) Under the 12th section of the act.

larly as the difficulty arising out of the annuity charged upon the premises had never been communicated to him.

His Lordship thought that the word "sale" must be construed strictly—a sale consummated, and conveyance executed; that the fund received was to be that out of which the plaintiff's *per centage* was to be paid; and consequently, that, by the terms of the contract, the plaintiff was bound to wait until the money was actually obtained by the defendant: though, if it could be shewn that the non-receipt of the money by the defendant arose out of any negligence or default of her own, she could not be permitted to set up as a defence that she had not obtained it.

A nonsuit was accordingly entered.

Mr. Serjeant *Jones*, in *Trinity* Term last, obtained a rule *nisi* that this nonsuit might be set aside, and a new trial had.—The view taken by his Lordship at the trial was too narrow. Regard must be had to the situation and intention of the parties. The sum obtained for the premises was to be the measure for ascertaining the *quantum* of remuneration due to the plaintiff; but he trusted the individual, not the fund. No intimation was given to the plaintiff that the defendant's title was defective, or that there was any charge upon the premises. It was not within the scope of his duty as a surveyor, to investigate the title. According to the construction contended for on the part of the defendant, if the incumbrance should equal the sum assessed, the plaintiff will get nothing; or, if the defendant chuses to delay to an indefinite period the receipt of the money, the plaintiff will in the mean time also be deprived of his commission. In the case of *Horford v. Wilson* (a), the defendant promised to pay the plaintiff 5*l.* "if he would provide a tenant for certain premises, and get the defendant 350*l.* for his lease:" the plaintiff accordingly procured

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v.
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(a) 1 Taunt. 12.

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one *Stevens*, with whom the defendant entered into an agreement, receiving from him 50*l.* as a deposit. *Stevens* being unable to complete his engagement, the defendant afterwards consented to release him from the further performance of it, but retained the 50*l.*—the Court held, that this was a substantial performance of the condition on the part of the plaintiff, and that he was therefore entitled to recover the 5*l.* from the defendant.

Mr. Serjeant *Wilde* now shewed cause.—The contract in question relates to many circumstances beyond the mere valuation of the premises. It seems that, after the inquiry finding the value of the premises, an abstract of the defendant's title was delivered, when a dispute arose as to whether or not the defendant was bound to buy up a charge on the property. Until that difference is arranged, the money cannot be obtained. While it remains uncertain what the defendant is to receive, how is the amount of the plaintiff's commission to be ascertained? If the delay had been occasioned by the wilful act of the defendant, undoubtedly the non-receipt of the money would be no defence; but there was no evidence or suggestion of any default by her. To entitle the plaintiff to maintain this action, he should have been prepared to shew that the defendant had been fraudulently delaying the business. The construction put upon the contract by his Lordship at the trial was perfectly correct, and in unison with the obvious intention of the parties. The fair interpretation of that instrument is, that the sale alluded to must be an available sale. Hitherto, the sale has not proved available; much further negotiation may yet be required to complete the business. In *Horford v. Wilson*, the defendant was put into possession of all that the plaintiff engaged for; but, in consequence of his own act, he failed to obtain the whole sum bargained for. Lord *Mansfield* there said: "The plaintiff procured a person who offered

to take the house upon the stipulated terms. The defendant made no objection; he accepted *Stevens*, entered into an agreement with him, and received 50*l.* as a deposit. A compromise afterwards takes place. The defendant does not renounce the agreement, but retains the 50*l.*, and dispenses with the further performance of it. This, upon every principle of fair construction, must be considered as a fulfilment of the contract on the part of the plaintiff." That case is, therefore, manifestly distinguishable from the present. The fact of the money being paid into the hands of the Accountant-General makes no difference; for it can only be obtained by the defendant by an application to the Court of *Exchequer*, or the Court of *Chancery*.

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Mr. Serjeant *Jones*, in support of his rule.—The construction of this contract is to be governed by the intention of the parties. Regard must also be had to the character of the plaintiff. As a surveyor, it was not his duty to inquire into the title of the vendor of the premises; he is not to be responsible for the adjustment of any technicalities that may be pointed at by the contract. It could not be intended that the amount of the plaintiff's commission should be affected by a charge upon the property, of which he had no notice. The fallacy of the argument on the part of the defendant arises out of the too narrow construction put upon the words "sale" and "obtained." The non-suit proceeded upon the ground that "sale" meant the perfection of the transfer, and "obtained" the passing of the money into the pocket of the vendor. It is clear, however, that, by "obtained," the parties merely understood the happening of the event in which the defendant was to become entitled to receive the money. The only distinction between the agreement in the case of *Horford v. Wilson*, and that in the present case, is, that the word used there was "get," and here "obtain."

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Lord Chief Justice TINDAL.—The question in this case depends upon the legal construction of the agreement entered into between these parties. Looking at the words of that agreement, we find that the defendant authorizes the plaintiff to negotiate with the Commissioners of Woods and Forests for the *sale* of certain premises. Stopping there, we are carried some way towards a right conclusion. Looking, however, at the latter part of the agreement, we find that the defendant undertakes to pay the plaintiff “2*l. per cent.* on the sum which may be obtained by private treaty, arbitration, or trial by jury, for his trouble and exertions on her behalf.” The words are not, on the sum agreed on, or awarded on arbitration, or ascertained by the verdict of a jury; but “on the sum *which may be obtained*” by either of these modes. Coupling those words with the former part of the agreement, it is clear that it contemplates that the plaintiff’s commission is to be calculated only upon the sum actually received.

It has been contended that this construction would leave it in the power of the defendant to delay the plaintiff for an indefinite period, or to defeat his claim altogether, by neglecting to receive the sum his exertions had entitled her to. That, however, is not a legal consequence. On general principles, a fraudulent delay on the part of the defendant to receive that which has been awarded her, would not constitute a defence. If she had neglected to receive the sum found to be due to her, or had done any thing wilfully to prevent the immediate settlement, she undoubtedly could not set up that in answer to the action. The construction contended for on the part of the plaintiff would be manifestly unjust; for, a considerable period might elapse before the sum awarded came into the pocket of the defendant, or it might ultimately turn out that a very small portion only of that sum was received. How in such case could the surplus *per centage* be recovered back? I do not agree that, the plaintiff being a surveyor, the

case is to be looked at differently on that account. If a man chuses to make such a bargain, on a conjecture as to the ultimate sum he may enable his employer to receive, he cannot claim his remuneration until that sum is definitively ascertained and actually received. The plaintiff might have himself employed an attorney to investigate the defendant's title.

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It seems to me that the plaintiff has brought his action too soon. He has commenced it not only before the time of the defendant's receiving the money, but also before the amount has been actually ascertained. If the annuitant is to be paid off out of the sum awarded to the defendant, that will take away so much of the plaintiff's claim for remuneration. The sum must not only be ascertained, but it must also be *obtained* before it can be known what measure of recompense the plaintiff is entitled to; unless, indeed, it was by the defendant's own voluntary act that the delay had arisen. I am therefore of opinion that the nonsuit should not be set aside.

Mr. Justice GASELER.—It is sufficient to say that the value of the defendant's interest has not yet been ascertained. The action therefore is premature. It is impossible to say what may ultimately be obtained by the defendant, consequently the plaintiff's claim cannot at present be calculated.

Mr. Justice BOSANQUET.—I am of the same opinion. I think the nonsuit ought not to be set aside, because the action was brought too soon. Collecting the intention of the parties from the agreement, it seems that the plaintiff was to receive *2l. per cent.* upon the sum *obtained* for the premises in question, when that sum should come to the disposition of the defendant. The negotiation for obtaining the money has not been interrupted by the voluntary act of the defendant. That negotiation is still going on,

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and the time is not yet arrived at which the defendant was to be entitled to receive the sum by means of the plaintiff's labour, and out of which the plaintiff was to receive the stipulated remuneration. The case of *Horford v. Wilson* appears to me to be distinguishable from the present. We do not see what was the form of the pleadings in that case; but it appears that the negotiation was ended by the voluntary act of the defendant. Under those circumstances, the plaintiff was entitled to avail himself of the contract.

Rule discharged.

Wednesday,
Jan. 12th.

The plaintiff, being nonsuited, obtained a rule nisi for a new trial. Afterwards, and before the rule came on for argument, the defendant died:—*Held*, that the suit did not thereby abate.

The defendant dying after the rule nisi for setting aside the nonsuit was granted, but before it came on for argument, *viz.* on the 12th September, 1830—

Mr. Serjeant *Jones* submitted that the suit abated. He referred to *Tidd's Practice* (a), where it is said—"At common law, the death of the sole plaintiff or defendant, before final judgment, would have abated the suit; but, as the judgment relates to the first day of the term, if the party be alive after that day, it may be entered, and costs taxed thereon, after his death." Again—"When either party dies *between verdict and judgment*, it is enacted by the statute 17 Car. 2. c. 8, that his death shall not be alleged for error, so as the judgment be entered within *two* terms after the verdict. *This statute does not seem to extend to nonsuits.*"

Thursday,
Jan. 13th.

Mr. Serjeant *Wilde*.—There is no foundation for the difficulty suggested. This is not the case of a defendant dying between verdict and judgment; but that of a defendant dying after the time he would have been entitled to

judgment but for the act of the plaintiff. It must be taken as if there was in fact a judgment. In *Toulmin v. Anderson* (a), it was expressly held, that, if a defendant dies pending the argument on a point reserved, on which judgment of nonsuit is afterwards given, his representatives are entitled, upon application to the Court, to enter up the judgment of the term next after the trial, that they may get the costs of the nonsuit. The Court there observed, "that, if the nonsuit had been submitted to at the time of the trial, to which time the subsequent decision of the Court had relation, the judgment would have been entered up of *Hilary Term* (b); and they could not therefore refuse the application."

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Mr. Serjeant Jones.—In *Toulmin v. Anderson*, there was a verdict for the plaintiff, by which the cause was before the Court; but there is no authority for such an application in the case of a nonsuit, where the plaintiff is out of Court.

Lord Chief Justice TINDAL.—The defendant, it appears, died after she would in the ordinary course of things have been entitled to judgment of nonsuit. But for the act of the plaintiff, she would have had judgment. It is therefore to be taken as if judgment of nonsuit had actually been signed. The case would have been different, had the defendant died before the time at which the judgment might have been signed.

Mr. Justice GASELEE.—The judgment is entered *nunc pro tunc*.

Mr. Justice BOSANQUET concurring—

Objection over-ruled (c).

(a) 1 Taunt. 385.

(b) The application was made in *Michaelmas Term*.

(c) See *Farrance v. Nill*, (*ante*, Vol. 4, p. 113), where the defendant died after a rule *nisi* for set-

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ting aside a nonsuit, and the Court intimated a strong opinion that the suit was thereby abated.

But see *Dowbiggen v. Harrison* (10 Barn. & Cress. 480),

where the Court of *King's Bench* held that the statute 17 Car. 2, c. 8, does not apply to cases of nonsuit. In that case, the defendant died before the day in banc.

Thursday,
Jan. 13th.

COOK v. TOWNSEND.

Quære, whether an insolvent debtor, who suffers judgment by default in an action brought against him, after he has duly obtained his discharge under the 7 Geo. 4, c. 57, (the debt having been inserted in his schedule), is entitled to be relieved from an execution upon a summary application.

THIS was an action of debt to recover the sum of 3*l.* 13*s.* 6*d.*, the amount of an attorney's bill. The defendant (who had obtained his discharge under the Insolvent Debtors' Act, and had inserted the debt in question in his schedule,) suffered judgment to go by default. The plaintiff having sued out a *feri facias*, under which the defendant's goods were seized—

Mr. Serjeant *Heath*, in the last term, obtained a rule *nisi*, that the execution might be set aside, upon affidavits which stated, that the defendant had been prevented by the conduct of the plaintiff from pleading his discharge in the mode pointed out by the 61st section of the 7 Geo. 4, c. 57 (a); for that, when informed of the defendant's insolvency, he said he would not proceed in the action.

(a) Which enacts—"That, after any person shall have become entitled to the benefit of the act, no writ of *fi. fa.* or *elegit* shall issue on any judgment obtained against such prisoner for any debt or sum with respect to which such person shall have so become entitled, nor in any action upon any new contract or security for payment thereof, except upon the judgment entered up against such prisoner according to the act; and that, if any suit or action shall

be brought, or any *scire facias* be issued against any such person, his or her heirs, executors, or administrators, for any such debt or sum, or upon any new contract or security for payment thereof, or upon any judgment obtained against, or any statute or recognizance acknowledged by such person for the same, except as aforesaid, such person, his or her heirs, executors, or administrators, may plead generally that such person was duly discharged according to this act,

Mr. Serjeant *Cross* now shewed cause.—He submitted that the defendant should have pleaded his discharge in the manner prescribed by the act; and that this was not a proper question to be decided upon affidavit. He also endeavoured to shew that the former part of the 61st section was intended to apply only to judgments obtained prior to the discharge of the insolvent.

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Mr. Serjeant *Heath*, in support of his rule, contended that the limited construction sought to be put upon the former part of the section, was not consistent with the latter part; and that, at all events, the conduct of the plaintiff in misleading the defendant, entitled the latter to have the execution set aside.

Per Curiam.—Without giving any opinion upon the enactment in question, which is very obscurely worded, it is enough to say, that, upon the affidavits, sufficient appears to warrant the Court in setting aside the execution.

Rule absolute, with costs (a).

by the order of adjudication made in that behalf, and that such order remains in force, without pleading any other matter specially; where-to the plaintiff or plaintiffs shall or may reply generally, and deny the matters pleaded as aforesaid, or reply any other matter or thing which may shew the defendant or defendants not to be entitled to the benefit of this act, or that such person was not duly discharged according to the provisions thereof, in the same manner as the plaintiff or plaintiffs might have replied, in case the defendant or

defendants had pleaded this act, and a discharge by virtue thereof, specially."

(a) See *Humphreys v. Knight*, (6 Bing. 572), where a bankrupt, who had obtained his certificate after issue and before judgment, having, after judgment, been rendered in discharge of his bail, was held entitled to be liberated on a summary application (by virtue of ss. 121 and 126 of the statute 6 Geo. 4, c. 16), although he had neglected to plead his certificate *puis darrein continuance*.

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Saturday,
Jan. 15th.

BLEADEN v. CHARLES.

The plaintiff accepted a bill of exchange for the accommodation of one *H*, who deposited it with the defendant as a security for goods bought of him. *H*. afterwards paid for the goods; but, he being further indebted to the defendant, the latter refused to restore the bill, and subsequently indorsed it for value to a third person, who sued the plaintiff thereon, and compelled him to pay the amount, with costs:—*Held*, that the plaintiff might recover from the defendant the amount of the bill, on a count for money paid: and *semble* that he might also have recovered the costs of the action brought against him by the holder, had they been mentioned in the particulars of demand.

THIS was an action of *assumpsit* for money alleged to have been paid by the plaintiff to the use of the defendant. The declaration contained a special count, which however was abandoned at the trial.

The cause was tried before Mr. Justice *Gaselee*, at the Sittings in *London* after last *Trinity* Term. The facts were as follows:—

The defendant accepted a bill for 68*l.* 15*s.* for the accommodation of one *Hay*. *Hay* afterwards purchased from the defendant goods to the value of 25*l.* 7*s.*, and deposited with him the bill in question by way of security, explaining to him at the time he indorsed it to him the circumstances under which the acceptance had been obtained. *Hay* afterwards paid the defendant for the goods, by a check upon his banker, and demanded the restoration of the bill; but, as *Hay* was largely indebted to him, the defendant retained the bill, and afterwards negotiated it to one *Henderson*. *Henderson* sued the plaintiff, who was ultimately compelled to pay the amount of the bill, and the costs of the action. The particular of demand delivered in the cause was not for the whole bill, but for 43*l.* 8*s.* only, and omitted all mention of the costs of *Henderson's* action.

It was objected on the part of the defendant, that there was no privity between him and the plaintiff to entitle the latter to maintain the action against him.

The learned Judge (reserving the point) left it to the Jury to say whether the bill had been deposited with the defendant as a security generally for the amount of *Hay's* debt, or only for the 25*l.* 7*s.*

The Jury found that the bill was merely deposited as a security for the 25*l.* 7*s.*, and returned a verdict for the plaintiff for 55*l.*, *vis.* 43*l.* 8*s.* for the bill, and 11*l.* 12*s.* for the costs of *Henderson's* action.

Mr. Serjeant *Spankie*, in the last term, obtained a rule nisi that this verdict might be set aside and a nonsuit entered.—He contended that there was no privity in the transaction between the plaintiff and defendant, nor any promise, express or implied, by the latter to repay to the former the money paid by him to *Henderson*, so as to entitle him to sue as for money paid to the use of the defendant: and that, at all events, the plaintiff was not entitled to the costs of the action brought against him by *Henderson*, he having no right to defend the action, and also because these costs were not contained in the particulars of demand.

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Mr. Serjeant *Wilde* now shewed cause.—By the deposit of the bill in question by *Hay* with the defendant, the plaintiff (the acceptor) became a surety to the defendant for the amount of the goods advanced to *Hay* upon the faith of that deposit. The goods being paid for, the defendant's property in the bill was at an end. He therefore had no right to negotiate it. Having, however, done so, he was bound to save the plaintiff harmless. The use of the bill by the defendant raises a sufficient privity between the parties to entitle the plaintiff to maintain this action. Where the act of one imposes upon another a legal liability to pay money, and he is compelled in consequence to pay it, the law will raise an implied promise to repay it. In *Exall v. Partridge* (a), it was expressly decided, that, where a man by compulsion of law pays a debt, he has a remedy against him who by law was bound to pay it, but did not. In that case, the goods of a stranger on the premises of another were distrained by the landlord for rent in arrear, and the stranger was obliged to pay the rent to redeem them—it was held, that the stranger might maintain *assumpsit* for money paid to the use of the ori-

(a) 8 Term Rep. 308; S. C. 3 Esp. Rep. 8.

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ginal lessees, who were bound by their covenants to the landlord, although some of them had, to the knowledge of the plaintiff, before he placed his goods on the premises, assigned their interest to one of their co-lessees, who was in the exclusive possession at the time. In *Down v. Halling* (a), where the owner of a check, for 50*l.*, drawn upon a banker, having by accident lost it, and it was tendered five days afterwards to the defendant, a shop-keeper, in payment for goods purchased of him to the value of 6*l.* 10*s.*, and he gave the difference to the purchaser, and next day presented the check at the bankers', and received the amount—it was held, that the owner might recover the value of the check in an action for money had and received, on the ground that the party who negotiated the check was not the *bond fide* holder, and the defendant had not exercised due caution in receiving it from a stranger, under circumstances that ought to have excited the suspicion of a prudent man. So, here, the defendant had no right to dispose of the bill, it having come to his hands for a special and limited purpose. In *Pownal v. Ferrard* (b), where the indorsee paid part of the amount of a bill to the holder, it was held that he might recover the same against the acceptor as money paid to his use. Lord *Tenterden* there said—"I am of opinion that the plaintiff is entitled to recover, upon the general principle that one man who is compelled to pay money which another is bound by law to pay, is entitled to be reimbursed by the latter; and I think that money paid under such circumstances may be considered as money paid to the use of the person who is so bound to pay it."

[The claim for the costs in *Henderson's* action, not being included in the particulars of demand, was abandoned.]

(a) 4 Barn. & Cress. 330; S. & P. 11.
 C. 6 Dowl. & Ryl. 455; 2 Car. (b) 6 Barn. & Cress. 439.

Mr. Serjeant *Spankie*, in support of his rule.—To entitle the plaintiff to maintain this action, there must have been some compulsion or obligation on him to pay, arising out of an antecedent contract or privity between the parties, as in *Exall v. Partridge*. Now, there was no communication whatever between the plaintiff and defendant upon the subject of this bill. The only privity was between the plaintiff and *Hay*, against whom the action should have been brought. In *Down v. Halling*, the sole question was as to the negligence of the defendant; and in *Pownal v. Ferrand*, the like relation existed between the plaintiff and defendant, as exists in this case between the plaintiff and *Hay*.

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Lord Chief Justice TINDAL.—I am of opinion that this transaction amounts to a payment of money by the plaintiff to the use of the defendant. The money was advanced by the former in a manner that has been serviceable to the defendant, and he has received the full benefit of it. The bill was indorsed by the defendant for a valuable consideration, an antecedent debt. It was a wrongful indorsement. The payment, however, was not voluntary on the part of the plaintiff. His name being upon the bill, he was by law compellable to pay it. The money was, therefore, compulsorily paid by him to the use of the defendant. If the defendant had sued the plaintiff on the bill, it would have been a good answer to the action, to shew that the defendant was not the *bond fide* holder of the bill, and had no title to it. If the defendant would not be in a situation to recover directly on the bill, it would be a singular doctrine to hold that he might receive the benefit of it by indorsing it over to a third person, and thus obtain indirectly that which he could not obtain directly. I am of opinion that the plaintiff would be entitled to recover the costs in *Henderson's* action also, if his claim were not restricted to the amount of the bill by the particulars of demand.

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Mr. Justice GASELEE.—I am also of opinion that the plaintiff is entitled to judgment. When the price of the goods, as a security for which the bill was deposited with the defendant, was paid or tendered, the defendant had no longer any property in the bill. The payment by the plaintiff was compulsory; he was rendered liable by the wrongful act of the defendant. It was either money had and received by the defendant to the use of the plaintiff, or, at all events, money paid by the latter to the use of the former. I think also the plaintiff would have been entitled to recover the amount, including the costs in *Henderson's* action, if the particulars did not restrict his demand to the bill.

Mr. Justice BOSANQUET.—I am of opinion that the plaintiff is entitled to recover as for money paid by him to the use of the defendant. It appears that the defendant was in possession of an acceptance of the plaintiff, which he had no right to retain, or at least to make use of. No value had been given for the bill either by *Hay* or by the defendant who negotiated it. If, therefore, it had even been negotiated with the assent of the plaintiff, it would have been but an accommodation bill, in which case the acceptor would have been entitled to recover back the amount.

Mr. Justice ALDERSON.—It seems to me that this money was paid by the plaintiff to the use of the defendant, and therefore that he is entitled to recover. The bill being in the hands of *Henderson* for value, the plaintiff was bound to pay it. That payment was clearly for the sole benefit of the defendant.

Rule discharged.

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Saturday,
Jan. 15th.

PARRY v. DUNCAN.

THIS was an action of replevin tried before Lord Chief Justice *Tindal*, at the Sittings at *Guildhall* after last *Trinity* Term.

The defendant avowed for three quarters' rent in arrear. Two issues were raised on the pleadings—the first, upon *non-tenuit*; the second, upon the defendant's replication, that the goods distrained had been fraudulently and clandestinely removed by the plaintiff to the place in which &c., to prevent the defendant from distraining them for rent in arrear.

The first witness, the defendant's son, proved that the plaintiff had occupied the premises in question, certain chambers in *Gray's Inn*; and that, on being applied to by the witness for the payment of 26*l.* 5*s.* for rent, the plaintiff admitted that that sum was due, but asked for time to pay it.

Another witness deposed to his having seen the plaintiff remove a pair of candlesticks from his late chambers to the premises where the distress was taken. This was the only evidence to bring the case within the statute 11 *Geo.* 2, c. 19.

On the part of the defendant, the case of *Opperman v. Smith* (a) was cited. There, a tenant, openly and in the face of day, and with notice to his landlord, removed his goods, without leaving sufficient on the premises to satisfy the rent then due, and the landlord followed and distrained the goods—it was held, in trespass for distraining the goods, that, although the removal might not be *clandestine*, yet, as it was *fraudulent*, the landlord was justified under the statute.

His Lordship left it to the Jury to say—first, whether

To entitle a landlord to follow and distrain goods, under the statute 11 *Geo.* 2, c. 19, there must be some evidence to shew that the removal was fraudulent, with intent to elude a distress, and also that sufficient was not left upon the demised premises to satisfy the landlord's claim.

(a) 4 Dow. & Ryl. 33.

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the rent was due—secondly, whether there had been any clandestine or fraudulent removal of the goods by the plaintiff, to prevent the defendant from distraining them.

The Jury found “ that the plaintiff did not hold the premises in question as tenant to the defendant.” There was no finding upon the second issue.

Mr. Serjeant *E. Lawes*, in the last term, obtained a rule *nisi* (on payment of costs), that the verdict entered for the plaintiff might be set aside, and a new trial had, on the grounds that the finding upon the first issue was against evidence, and that there was enough upon the second to warrant a finding that the goods were removed with intent to defeat the landlord's claim for rent. He referred to the judgment of the Court in the case cited, where Lord Chief Justice *Abbott* said—“ Certainly, this cannot be called a clandestine removal: but, if it was fraudulent, it will support the plea. The evidence of fraud, I admit, was slight, but I think there was some. One object of the statute was, to give the landlord a more speedy remedy than an action for the recovery of the rent would afford him, and I cannot say that this landlord was not entitled to that remedy.” And Mr. Justice *Best*—“ I think there was some evidence of a fraudulent intention, though I must confess it is exceedingly slight. It is the duty of every tenant, when he is about to quit his residence, to pay his landlord his rent before he removes his goods, and the fact of removing the goods before the rent is paid, or in any manner provided for, implies something very like an intention to evade the payment altogether. The statute 11 *Geo. 2*, c. 19, in my opinion, applies to all cases where the landlord is, by the conduct of his tenant, turned over to the barren right of bringing an action for his rent. In this case, there is no evidence that the rent was tendered before the removal began, and therefore I think there was some evidence of fraud to go to the Jury.”

Mr. Serjeant *Wilde* now shewed cause.—The finding of the Jury, that the plaintiff did not hold as tenant to the defendant, is decisive of the question. *Opperman v. Smith* is altogether inapplicable to the present case. There was in that case some evidence of a fraudulent removal; whereas, here, it only appeared that a pair of candlesticks had been removed to other chambers which the plaintiff had taken. There was nothing to shew that sufficient did not remain upon the premises in respect of which the rent was alleged to have become due, to satisfy the defendant's claim. The statute 11 *Geo. 2*, c. 19, was passed for the avowed purpose of repressing fraud, and to prevent tenants from evading payment of rent due to their landlords. But it does not follow that every removal of goods, where rent may be due, is necessarily fraudulent.

Mr. Serjeant *E. Lawes*, in support of his rule.—The evidence given in support of the first issue would have been sufficient in an action for use and occupation. Upon the other issue, as to the fraudulent removal, there has been no finding, although the facts proved were amply sufficient to warrant a finding upon that issue for the defendant. The Jury should at all events have said whether there was fraud or not.

Lord Chief Justice TINDAL.—If the present decision would have the effect of depriving the defendant of his remedy for the recovery of any rent that may be due to him, we should pause before we discharged this rule. Such, however, will not be the effect of our refusing to send this cause down for a second trial; for, the landlord still has his remedy by an action for use and occupation. Besides, in this form of action, the plaintiff would, in the event of a verdict for the defendant, be liable to double costs; and his sureties also would suffer the hardship of a renewal of the liability from which they are now discharged. We

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ought, therefore, to see our way very clearly before we decide upon reviving that liability. Upon the evidence given at the trial, I entertain considerable doubt as to the correctness of the finding upon the first issue on *non ten-uit*; for, the admission deposed to by the first witness was in my judgment enough to fix the plaintiff: but, before he could be entitled to recover, the defendant must have the second issue found in his favour, *viz.* the issue raised by the replication, that the plaintiff within a certain time fraudulently removed goods from the chambers in respect of which the rent accrued. The question is, whether there was any evidence to sustain that issue. The only evidence given upon that point was, that certain articles had been removed by the plaintiff from the chambers in question to the place where the distress was taken; candlesticks only, however, were mentioned. But there was no evidence that they even were removed with a view to elude a distress; neither did it appear whether any thing, and what, was left upon the premises: if sufficient property were left to satisfy the claim of the landlord, the issue would not have been made out. It is unnecessary for us to consider the rule laid down in the case of *Opperman v. Smith*. It is enough to say that the defendant did not adduce evidence sufficient to justify his proceeding under the statute.

Mr. Justice BOSANQUET.—I am of opinion that no ground has been laid before us to induce the Court to send the cause down for a second trial. From what appears on the notes of the Lord Chief Justice, I should certainly have felt better satisfied had the first issue been found the other way; but, with respect to the other issue, I think there was nothing in the evidence to warrant a supposition that there was any fraudulent removal with intent to defeat the defendant in the recovery of his rent. In *Opperman v. Smith*, the assumption of fraud was a necessary consequence, for

it appeared that the premises had been entirely stripped. The only evidence here was, that a pair of candlesticks had been removed; there was a total silence as to all the rest of the property. Under the circumstances, I think the safer course will be, to leave the defendant to his remedy by an action for use and occupation.

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Mr. Justice ALDERSON.—I entirely concur in the decision pronounced by the rest of the Court. I am satisfied that the finding was wrong upon the first issue; but I do not see that, upon the evidence offered on the second, there was enough to sustain it. The landlord should have been prepared to shew that there were no goods left upon the premises in respect of which the rent accrued to him; and that they had been removed clandestinely or fraudulently, with a view to deprive him of his remedy for the recovery of the rent. It would therefore be fruitless to send the cause down again.

Rule discharged.

BUCKWORTH v. LEVI.

Monday,
Jan. 17th.

THIS was an action of *assumpsit* on a bill of exchange, by an indorsee against the drawer. The defendant having been arrested upon an affidavit of debt made by the plaintiff, stating "that the defendant was justly and truly indebted to the deponent in the sum of 1115*l*., upon a certain bill of exchange drawn by the defendant upon Messrs. *Cooper & Levi*, for the payment of the said sum of 1115*l*. to the deponent or his order, at a certain day now past"—

The affidavit to hold to bail in an action by the payee or indorsee of a bill of exchange, against the drawer, must allege the default of the acceptor.

Mr. Serjeant *Spankie*, on a former day in this term, obtained a rule *nisi* that the bail-bond might be cancelled, on the defendant's entering a common appearance. He contended that the above affidavit was insufficient, inasmuch

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as it did not shew that the bill had been presented to or dishonoured by the acceptor, which was necessary to create a liability on the part of the drawer, whose engagement was only secondary; and he referred to *Machuv v. Fraser* (a), where the defendant was arrested on an affidavit stating that he was indebted to the plaintiff on a bill of exchange drawn by the plaintiff upon and accepted by the defendant; and Lord Chief Justice *Gibbs* said—"Every word of this may be true, and yet the plaintiff may not be entitled to arrest the defendant; and, if so, certainly it is not such an affidavit as can support this arrest." So, here, he submitted, that every word of this affidavit might be true, and still the plaintiff might have no right to arrest the defendant.

[Lord Chief Justice *Tindal* referred to the form of the affidavit in an action by the indorsee against the drawer of a bill, in *Tidd's Appendix* (b)].

Mr. Serjeant *Jones* now shewed cause.—The plaintiff swears that the defendant, as drawer of the bill, is indebted to him as payee. As the drawer could only be liable on the default of the acceptor, it may be assumed that the bill has been dishonoured; it was not absolutely requisite to state that fact distinctly and positively. The affidavit shews a *prima facie* liability in the defendant. The plaintiff was not bound to aver in the affidavit, as he would in declaring, a presentment to the acceptor, and his refusal to pay, and notice of that fact to the drawer. In *Warmesley v. Macey* (c), an affidavit stating that the defendant was indebted to the plaintiff, "as the acceptor of a certain bill of exchange, bearing date, &c., drawn by A., for a valuable consideration, upon and accepted by the de-

(a) 7 Taunt. 171; S. C. 2 Marsh. 493.

tice, p. 79.

(c) 5 J. B. Moore, 52; S. C. 2

(b) To the 9th Edit. of the *Prac.* Brod. & Bing. 338.

fendant, payable at two months after the date thereof, and due at a day now passed"—was held sufficient.

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Lord Chief Justice TINDAL.—The defendant, as drawer of the bill, is not the party who is primarily liable to the holder; his liability arises only on the breach of a certain condition imposed upon another, *vis.* a failure of payment by the acceptor. It certainly is not necessary that the affidavit to hold to bail should be framed with all the precision of a declaration; but, in such a case as the present, enough should appear upon the face of the affidavit to shew us that the secondary liability has been incurred—that the acceptor has made default. This has not been done; for, the affidavit contains no suggestion either of non-acceptance or non-payment by the drawee. It is the duty of a party making an affidavit to hold a defendant to bail, to adhere to the accustomed forms.

Mr. Justice PARK.—The affidavit in question might have been good as against the acceptor of the bill. Parties ought not to deviate from the established forms used in the Courts. The plaintiff ought to have shewn *how* the defendant became indebted to him. He has not done so, and therefore I concur in thinking that the rule for cancelling the bail-bond given by the defendant, should be made absolute.

Mr. Justice BOSANQUET.—I am of the same opinion. In the ordinary form of the affidavit to hold to bail in an action by a payee or indorsee against the drawer, the default of the acceptor is set forth. This is necessary; for, otherwise, it does not appear how the liability of the drawer arises.

Mr. Justice ALDERSON.—Something must appear on the face of the affidavit to hold to bail in a case like the pre-

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sent, to satisfy the Court that the defendant was at some one moment indebted to the acceptor. The liability of the drawer only arises upon the default of the acceptor. That fact must therefore appear, to entitle an indorsee to hold the drawer to bail.

Rule absolute.

Tuesday,
Jan. 18th.

By agreement between the plaintiff and defendant, the former engaged to let to the latter certain land, upon which the defendant engaged to build certain houses, the plaintiff to lend him 6,000*l.* for that purpose, which sum the defendant was not to be called upon to pay before the 24th June, 1829; and the defendant agreed to convey the houses to the plaintiff, when completed, as a security for the advance. In pursuance of this agreement, the plaintiff advanced to the defendant 1168*l.* 19*s.* On the completion of six of the houses, the defendant, at the request of the plaintiff, discontinued the building. After the 24th June, 1829, the plaintiff brought *indebitatus assumpsit* for the 1,168*l.* 19*s.*—*Held*, that the action was maintainable, the special contract being rescinded by the consent of the parties.

JAMES, Gent., one &c., v. COTTON.

THIS was an action of *indebitatus assumpsit*. The declaration contained counts for money lent, goods sold, and other common counts.

A verdict was, by consent, entered for the plaintiff, damages 4,000*l.* costs 40*s.*, subject to a reference. The arbitrator awarded that the verdict entered for the plaintiff should stand, but that the damages should be reduced from the sum of 4,000*l.* to 1,438*l.* 11*s.*; and he found as follows:—

That the action was commenced in *Trinity* Term, 1829; that the declaration contained counts for goods sold and delivered, money lent, money paid, laid out, and expended, money had and received, counts for interest, and upon an account stated; to which the defendant pleaded the general issue, and delivered a notice of set-off for work and labour and materials found, for goods sold and delivered, money lent, money paid, laid out, and expended, money had and received, money due on the balance of an account stated between the parties, and for interest due from the plaintiff to the defendant.

The arbitrator also found, that an agreement in writing, not under seal, bearing date the 31st of *May*, 1827, was duly made and executed by and between the plaintiff and defendant, whereby—after reciting that the plaintiff was seised of, or otherwise well entitled to, the fee-simple and

the action was maintainable, the special contract being rescinded by the consent of the parties.

inheritance in possession of certain lands and hereditaments situate at *Worthing*, in the county of *Sussex*, and that the plaintiff had agreed to grant to the defendant, who had agreed to accept and take a lease or leases of part of the said lands and hereditaments, for the purpose of building messuages or tenements and other erections thereon, for the term, at the several rents, and under and subject to the covenants, stipulations, and agreements thereafter expressed—it was witnessed, and the plaintiff, in consideration of the covenants and agreements thereafter contained, on the part of the defendant to be observed and performed, did thereby, for himself, his heirs, executors, and administrators, covenant and agree with the defendant, his executors, administrators, and assigns, that the plaintiff, his heirs and assigns, should and would, when and so soon as the defendant should have covered in the six messuages thereafter contracted to be built (upon the same scale and dimensions as the houses then built upon other part of the said ground) on the six plots or parcels of ground next thereafter described, in a good and substantial manner, upon the request, and at the expense, in all things, of the defendant, grant and execute one or more good and effectual lease or leases to him (subject always, by way of security to the plaintiff, in the first place, for such monies as the plaintiff might have lent and advanced as thereafter agreed, and of such goods as the plaintiff might have furnished or supplied to the defendant) of all those six plots or parcels of ground, part of a larger piece of ground of the plaintiff, situate at *Worthing* aforesaid, as the same plots of ground were drawn, distinguished, and described upon and by the said agreement, to hold the same to the defendant, his executors, administrators, and assigns, for the term, at the yearly rent, and upon the conditions in the same agreement mentioned. And the plaintiff further covenanted and agreed with the defendant, that the plaintiff should and would, when and

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so soon as the defendant should have covered in fourteen messuages thereafter contracted to be built on the plot of ground next thereafter described, in a good and substantial manner, upon the request and at the expense, in all things, of the defendant (subject nevertheless as aforesaid), grant and execute a lease to him of all that plot or parcel of ground, other part of the said lands of the plaintiff, situate at *Worthing* aforesaid, as the same plot of ground was drawn and described upon and by the said agreement, to hold the same unto the defendant, his executors, administrators, and assigns, for the term, and at the yearly rents, and upon the conditions in the said agreement mentioned. And, in consideration of the covenants and agreements in the said agreement contained on the part of the plaintiff, the defendant covenanted with the plaintiff, that he the defendant would, by or before the 24th *June*, 1828, at his own proper costs and charges in all things, erect, build, and completely finish fit for habitation, subject to the approbation of the plaintiff, or his surveyor for the time being, six several messuages or dwelling-houses, upon the six plots or parcels of ground firstly thereby agreed to be demised; and also fourteen several messuages or dwelling-houses upon the same plot or parcel of ground lastly thereby agreed to be demised, with suitable out-offices thereto respectively, according to the plan, elevation, and specification thereof respectively annexed to the said agreement, and signed by the plaintiff and the defendant; and should and would complete the carcasses and cover in all the before-mentioned messuages or dwelling-houses, by the 25th day of *December* then next. And, by the said agreement—after further reciting that the defendant, having occasion to borrow and take up at interest the sum of 6,000*l.* for the purpose of carrying on and completing the erection of the said several messuages and buildings, and having also occasion for the supply of a quantity of bricks and other materials for the pur-

poses of such buildings, to be wholly expended and employed on the said estate, had requested the plaintiff to advance and lend and supply the same at the time and in the manner thereafter mentioned, which the plaintiff had agreed to do—the plaintiff covenanted with the defendant that he would advance and lend to the defendant the sum of 6,000*l.*, he paying interest for the same at and after the rate of 5*l. per cent. per annum*, such interest to be paid quarterly, and to be computed from the respective times of advancing the said sum of 6,000*l.* thereinbefore mentioned, or any sum and sums in respect thereof, or as part thereof; the said sum of 6,000*l.* to be advanced to the defendant at the times and in manner following (that is to say)—the sum of 500*l.* in the month of *June* then next, the sum of 500*l.* in the month of *July* then next, the sum of 500*l.* in the month of *August* then next, the sum of 500*l.* in the month of *September* then next, the sum of 2,000*l.* on the 25th of *September* then next, and the sum of 2,000*l.* on the 25th day of *December* then next, upon which said 25th day of *December*, the amount due to the plaintiff for such bricks and other materials as should have been supplied to the defendant, should be taken as cash, and bear interest from that day until paid; and also that the plaintiff should not call upon the defendant, his executors, or administrators, to pay the said sum of 6,000*l.*, nor the amount due in respect of the said bricks and materials, before the 24th of *June*, 1829. And the defendant thereby covenanted with the plaintiff, that the defendant should well and truly pay the plaintiff the said sum of 6,000*l.*, together with interest for the same after the rate of 5*l. per cent. per annum*, to be computed from the respective times of advancing the same as aforesaid, together with the amount of such bricks and other materials, on the 24th *June*, 1829; and that, in the mean time, the lease and leases thereby agreed to be granted and executed, and all the property of the defendant upon

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the premises agreed to be demised, or elsewhere, at *Worthing*, should always be subject to and stand as a security for the amount of such advance, to be retained by the plaintiff until the whole of such advance should be repaid to him; and also that all the building materials brought by the defendant upon the said several plots of ground thereby agreed to be demised, or elsewhere, at *Worthing*, for the erection and completion of the said messuages and buildings thereby agreed to be erected thereon respectively, and also all and every the said several messuages and buildings, when so erected, should stand charged with, and be taken and considered as a security for the re-payment to the plaintiff of such advances and supply of bricks and materials, with the interest thereof as aforesaid.

And the arbitrator further found, that, in furtherance of the said agreement, the plaintiff advanced to the defendant several sums of money, amounting in the whole to 1,168*l.* 19*s.*, namely 500*l.* in the month of *June*, 1827; 250*l.* in the month of *July*; 100*l.* in the month of *November*; and 100*l.* in the month of *December*, in the same year; and 218*l.* 19*s.* in the month of *January*, 1828; and that bricks and materials to the value of 884*l.* 11*s.* were furnished by the plaintiff to the defendant before the 25th of *December*, 1827; and also that the defendant had completed and covered in the six carcasses of the dwelling-houses upon the six plots of ground in the said agreement first agreed to be demised, before the 25th of *December*, 1827; but that the defendant did not further proceed with the same according to the terms of the said agreement, and, in consequence of an oral request by the plaintiff, the defendant did not begin to build any of the said fourteen several dwelling-houses upon the plot of ground by the said agreement lastly agreed to be demised; also that the defendant did not pay any interest whatever; that the action was brought to recover the said sum of 1,168*l.* 19*s.*, being the amount of the several sums of money advanced by the

plaintiff to the defendant, together with interest for the same, which, being calculated, according to the terms of the agreement, up to the time of the commencement of the action, the arbitrator found amounted to 107*l.* 14*s.* 8*d.*; and that the action was also brought to recover the said sum of 834*l.* 11*s.*, the price of the bricks and materials, together with interest for the same from the 25th of *December*, 1827, which, up to the commencement of the action, the arbitrator found amounted to 62*l.* 17*s.* 5*d.*

The question of law raised on the part of the defendant was—Whether the action was maintainable, the plaintiff having contracted by the agreement to advance 6,000*l.* to the defendant at the times and in the manner therein specified, whereas he advanced only a part of the said sum of 6,000*l.*; and, if the action was maintainable, a further question was raised on the part of the defendant—Whether the plaintiff was entitled to recover all the four several sums of 1,168*l.* 19*s.*, 107*l.* 14*s.* 8*d.*, 834*l.* 11*s.*, and 62*l.* 17*s.* 5*d.* The arbitrator further found, that, under the notice of set-off, the sum of 735*l.* 11*s.* 1*d.* was due from the plaintiff to the defendant; and that, if the Court should determine the action to be maintainable for the full amount of the said four sums of 1,168*l.* 19*s.*, 107*l.* 14*s.* 8*d.*, and 62*l.* 17*s.* 5*d.*, then the arbitrator awarded that the said sum of 735*l.* 11*s.* 1*d.*, being the sum proved under the defendant's set-off, should be deducted therefrom, and that the verdict for the plaintiff should stand, but that the damages, according to the former part of his award, should be reduced from 4,000*l.* to the sum of 1,438*l.* 11*s.*; or, if the Court should be of opinion that the action was not maintainable for the whole of the said four sums claimed by the plaintiff, but only for part thereof, then the arbitrator awarded and directed that the damages should be reduced to the sum for which the Court should determine the action to be maintainable, after deducting therefrom the said sum of 735*l.* 11*s.* 1*d.*, the amount of the defendant's set-off.

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Mr. Serjeant *Wilde*, for the plaintiff.—Notwithstanding that the whole sum stipulated for by the agreement was not advanced, still *indebitatus assumpsit* will lie for that part which was advanced, the period mentioned in the agreement for its repayment having long since elapsed. If a party contract to do more than he actually does, he may recover for the part he has performed, provided the action be not commenced before the time of payment agreed upon. In *Oxendale v. Wetherell* (a), the plaintiff contracted to deliver to the defendant two hundred and fifty bushels of wheat within a specific time, but delivered a part only; it was held that he might, after the expiration of the credit stipulated for by the contract, recover the value of the portion he had delivered. The same principle was recognized in *Walker v. Dixon* (b); there, the plaintiff had contracted to deliver one hundred sacks of flour, of which a small part only were delivered; in an action for the price of that portion, the plaintiff was nonsuited, but the Court afterwards set aside the nonsuit, and the plaintiff recovered. In *Waddington v. Oliver* (c), the action was commenced before the day on which, by the terms of the contract, the whole of the goods were to have been supplied. Here, however, before the commencement of the action, all was done which the plaintiff was bound to do. He is not now to advance the residue; for, the houses, which were to be the security for the money lent, are not built (d).

Mr. Serjeant *Spankie*, for the defendant.—The only question in this case is, whether, under the circumstances, this form of action is maintainable. If a special agreement for the sale of goods be performed, or the time fixed for

(a) 9 Barn. & Cross. 386.

(c) 2 New Rep. 61.

(b) 2 Stark. N. P. C. 281—cited in the before-mentioned case.

(d) The claim for interest was abandoned.

its performance have elapsed, the respective rights of the parties are ascertained, and there is a measure by which to give or receive compensation. In the present case, the agreement is complicated. The whole consideration is not money lent. Many things are to be done on either side. The whole must be performed, before the transaction can be treated as an advance of money. The agreement was in full force and unrescinded at the time the action was brought; and the money having been advanced under the terms of the agreement, the plaintiff should have declared upon it specially. In *Cooke v. Munstone* (a), the plaintiff, having declared upon an agreement to deliver soil or breeze, with a count for money had and received, proved that the defendant having agreed to deliver soil, he, the plaintiff, paid 2*l.* 5*s.* for earnest, but that the defendant refused to deliver the soil—it was held that he could not recover damages for the non-delivery on the first count, on account of the variance; nor the 2*l.* 5*s.* upon the second, because the agreement was still in force; and Sir *James Mansfield* said (b)—“I apprehend the rule to be this: where a party declares on a special contract, seeking to recover thereon, but fails in his right to do so altogether, he may recover on a general count, if the case be such, that, supposing there had been no special contract, he might still have recovered for money paid or for work and labour done. As in the case of a plaintiff suing a defendant as having built a house for him according to agreement; there, if he fail to prove that he has built it according to agreement, he may still recover for his work and labour done. In *Buller's Nisi Prius* (c), the rule is thus laid down:—‘If a man declare upon a special agreement, and likewise upon a *quantum meruit*, and at the trial prove a special agree-

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(a) 1 New Rep. 351.

(b) Ibid. 355.

(c) *Weaver v. Burrows*, Bul. Ni.

Pri. 2nd edit. p. 139; 7th edit. by
Bridgman, 139 a.

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ment, but different from what is laid, he cannot recover on either count; not on the first, because of the variance; nor on the second, because there was a special agreement: but, if he prove a special agreement, and the work done, but not pursuant to such agreement, he shall recover upon the *quantum meruit*, for otherwise he would not be able to recover at all.'” In *Oxendale v. Wetherell*, the contract was at an end; whilst here, it was in full effect.

Mr. Serjeant *Wilde*, in reply, was stopped by the Court.

Lord Chief Justice TINDAL.—The rule is, that, where there is a special agreement in existence, capable of being carried into effect, and involving a condition precedent to the plaintiff's claim, he is bound to declare upon it, and to aver performance on his part, or excuse its non-performance by some act of the defendant. Here, however, there is no condition precedent. The parties merely stipulate that a certain sum shall be advanced; but there is nothing to prevent the plaintiff from recovering what he may advance, unless the whole of the sum was advanced; and even if there had been any such condition, it has been waived by the act of the parties. The arbitrator finds that the defendant had completed six carcasses; but that he did not further proceed with the same according to the terms of the agreement, and that, in consequence of an oral request by the plaintiff, the defendant did not begin to build any of the said fourteen several dwelling-houses upon the plot of ground by the agreement lastly agreed to be demised. It appears, therefore, that the contract was rescinded with the assent of the parties. There consequently cannot be any reason for having recourse to the original agreement. There was a legal liability upon the defendant to repay the money advanced, and for which *indebitatus assumpsit* will lie. The plaintiff, therefore, was not bound to declare specially upon the contract. The case resolves

itself into a mere agreement by the defendant to repay money advanced to him by the plaintiff.

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Mr. Justice PARK.—I am of the same opinion. This cannot be said to be an existing agreement. It had been put an end to by the assent of both parties. The case of *Oxendale v. Wetherell*, appears to me, in principle, not to be distinguishable from the present.

Mr. Justice BOSANQUET.—The defendant received part of the benefit of the contract, by the advance of money, and the supply of goods. The plaintiff was not in a situation to perform the whole of the agreement, and it was rescinded by mutual consent. He is therefore entitled to recover on the count for money lent.

Mr. Justice ALDERSON concurred.

Judgment for the plaintiff.

HARE v. RICKARDS and Another.

Wednesday,
Jan. 19th.

THIS was an action of special *assumpsit* for the breach of a guarantie. The first count of the declaration stated, in

The defendants gave the plaintiff the following undertaking in writing:—"We

hereby undertake to pay you, agreeably to instructions from J. W., 1,262*l.* on his account, as soon as we shall have received from Messrs. R. & R., of New South Wales, the amount of moneys in their hands belonging to J. W., and now under attachment by you." By the letter of instructions from J. W. to the defendants, he authorized them to pay the plaintiff, in consideration of his having agreed to release an attachment of certain moneys which were to come into the defendants' hands from Messrs. R. & R., 1,262*l.* out of the said moneys, when the defendants should receive them on J. W.'s account: the payment to be taken by the plaintiff in discharge of a bill for 1,262*l.*, and which bill J. W. requested the defendants to receive from the plaintiff at the time of payment as a sufficient discharge:—*Held*—*first*, that the plaintiffs were bound to pay the plaintiff the above sum of 1,262*l.* on the receipt of the first proceeds remitted by Messrs. R. & R. on account of J. W., and that they could not postpone the payment until they had received the whole amount of the moneys in the hands of Messrs. R. & R. belonging to J. W.—*secondly*, that the plaintiff was not entitled to recover interest from the time the defendants received a sufficient sum belonging to J. W. from Messrs. R. & R. to satisfy their undertaking, as they did not guarantee the payment of the bill of exchange, it being merely referred to in the instructions as an outstanding security which the defendants were to receive from the plaintiff at the time of payment.

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substance, that, in consideration that the plaintiff had agreed to release or withdraw an attachment on certain moneys of one *John Wrentmore*, which were to come into the defendants' hands from Messrs. *Rain & Ramsay*, of *New South Wales*, the defendants undertook to pay the plaintiff the sum of 1,262*l.* 5*s.* 6*d.* on account of *Wrentmore*, as soon as the defendants should have received from Messrs. *Rain & Ramsay* the amount of moneys in their hands belonging to *Wrentmore*, and which were under attachment by the plaintiff. The plaintiff then averred, that, although the defendants had received the said sum of 1,262*l.* 5*s.* 6*d.* from Messrs. *Rain & Ramsay*, on account of *Wrentmore*, yet that they had not paid it to the plaintiff, but had altogether refused and neglected so to do.

At the trial of the cause, before Lord Chief Justice *Tindal*, at *Guildhall*, at the Sittings after the last *Trinity* Term, the plaintiff gave in evidence the following undertaking, inclosed to him in a letter written and signed by the defendants:—

“ *London, 2nd October, 1827.*

“ Sir,—We hereby undertake to pay you, agreeably to instructions from Mr. *John Wrentmore*, the sum of 1,262*l.* 5*s.* 6*d.* on his account, as soon as we shall have received from Messrs. *Rain & Ramsay*, of *New South Wales*, the amount of moneys in their hands belonging to Mr. *Wrentmore*, and now under attachment by you.

Rickards, Mackintosh, & Co.

To Mr. *Joseph Hare*, *Great Warwick Street.*”

The instructions from *Wrentmore* to the defendants, were as follows:—

“ To Messrs. *Rickards, Mackintosh, & Co.*

“ *1st October, 1827*

“ Gentlemen,—I hereby authorize and request you to pay to Mr. *Joseph Hare*, in consideration of his having agreed to release an attachment on certain moneys of

mine, which are to come into your hands from Messrs. *Rain & Ramsay*, of *New South Wales*, the sum of 1,262*l.* 5*s.* 6*d.*, out of the said moneys, when you shall receive them on my account. The said payment to be taken by Mr. *Hare* in discharge of a bill for 1,262*l.* 5*s.* 6*d.*, dated this day, at nine months' date, and which bill I must request of you to receive from Mr. *Hare*, at the time of payment, as a sufficient discharge.

John Wrentmore."

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It was admitted, that the plaintiff was a creditor of *Wrentmore's*, and that he had sued out an attachment in the Lord Mayor's Court, on certain property of his, which the defendants expected to receive from Messrs. *Rain & Ramsay*, of *New South Wales*; that, when the defendants received the above instructions from *Wrentmore*, he had 4,000*l.* in Messrs. *Rain & Ramsay's* hands; and that, in *February*, 1828, they remitted 2,000*l.* to the defendants. It also appeared, that the defendants were creditors of *Wrentmore*, and that they had a lien on that sum for advances previously made on his account, but of which they did not inform the plaintiff when they gave him the above undertaking. The Jury found a verdict for the plaintiff, for 1,262*l.* 5*s.* 6*d.* leave being reserved to him to increase it, by adding the amount of the interest on that sum, from the day of the receipt of the 2,000*l.* by the defendants from *Rain & Ramsay*, viz. in *February*, 1828.

Mr. Serjeant *Wilde*, in the last term, accordingly obtained a rule *nisi* to increase the verdict, by adding 175*l.* 5*s.* 8*d.*, being the amount of such interest. He referred to the cases of *Arnott v. Redfern* (a), *Page v. Newman* (b), *Foster v. Weston* (c), and *Slack v. Lowell* (d), and submitted, that, as the defendants undertook to pay

(a) 3 Bing. 353; S. C. 11 J. 4 Man. & Ryl. 305.
B: Moore, 209. (c) 6 Bing. 709.
(b) 9 Barn. & Cress. 378; S. C. (d) 3 Taunt. 157.

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the plaintiff a certain sum in discharge of a bill of exchange, on which the plaintiff would be entitled to interest from the day it became due, and would have recovered it had he sued *Wrentmore* on the bill, in case the defendants had made default, or refused to comply with their undertaking, the plaintiff was entitled to such interest.

Mr. Serjeant *Taddy*, on a subsequent day, obtained a rule *nisi*, that the verdict found for the plaintiff might be set aside, and a verdict entered for the defendants instead thereof, on the ground, that they were not bound to pay the plaintiff on the receipt of the sum of 2,000*l.* from *Rain & Ramsay*, in *February*, 1828, as he could not require payment until the defendants had received *the amount* of the moneys in their hands belonging to *Wrentmore*, which, at the date of the undertaking, appeared to have been 4,000*l.*, and which sum the defendants had not yet received.

The Court ordered both rules to come on for argument at the same time.

Mr. Serjeant *Wilde* and Mr. Serjeant *Spankie* now shewed cause against the rule for setting aside the verdict for the plaintiff.—As the defendants undertook to pay the plaintiff a certain sum on account of *Wrentmore*, agreeably to instructions received from him, they were bound to pay it as soon as they had received a sufficient sum for that purpose, particularly as *Wrentmore* had authorized and requested the defendants to pay when they should receive moneys on his account. The letter containing *Wrentmore's* instructions to the defendants, and their undertaking, must be looked at together, by which it is clear that the plaintiff was entitled to receive the sum of 1,262*l.* 5*s.* 6*d.* as soon as *Rain & Ramsay* had transmitted the defendants sufficient funds for that purpose, and which they did in *February*, 1828.

Mr. Serjeant *Taddy* and Mr. Serjeant *Stephen*, in support of the rule.—The defendants were not bound to pay the plaintiff out of the first moneys they received from *Rain & Ramsay* on *Wrentmore's* account, but were entitled to postpone such payment until they had received the *amount* of the moneys in *Rain & Ramsay's* hands belonging to *Wrentmore*, which, at the time of the defendants' undertaking, amounted to 4,000*l.*, only 2,000*l.* of which they had received at the time of the commencement of this action. Although the plaintiff had an attachment on *Wrentmore's* property which was about to be transmitted to the defendants, yet it did not deprive them of their right of lien, and *potior est conditio defendentis*. There was no consideration on the ground of a forbearance by the plaintiff to sue *Wrentmore*, and the defendants merely undertook to pay him a certain sum as soon as they should have received the amount of moneys in *Rain & Ramsay's* hands, belonging to *Wrentmore*. That, *ex necessitate*, means the whole sum then in their hands; and it was proved at the trial that they had only received a moiety at the time the present action was commenced.

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Lord Chief Justice TINDAL.—The only question is on the construction of the defendant's engagement or undertaking of the 2nd *October*, 1827, by which they undertook to pay the plaintiff, agreeably to instructions from Mr. *John Wrentmore*, 1,262*l.* 5*s.* 6*d.* on his account, as soon as the defendants should have received from Messrs. *Rain & Ramsay*, of *New South Wales*, the amount of moneys in their hands belonging to *Wrentmore*, and then under attachment by the plaintiff. The question, then, is, whether the defendants were bound to pay that sum to the plaintiff, when they received from *Rain & Ramsay* a sufficient amount to discharge their undertaking, or whether the defendants were entitled to postpone the payment to the

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plaintiff, until they had received the *whole amount* of *Wrentmore's* moneys then in the hands of *Rain & Ramsay*. The defendants undertook to pay the plaintiff, agreeably to instructions they had received from *Wrentmore* on the preceding day, and by which he authorized and requested them to pay the plaintiff, in consideration of his having agreed to release an attachment on certain moneys of *Wrentmore's*, which were to come into the defendants' hands from Messrs. *Rain & Ramsay*, when the defendants should receive it, on his (*Wrentmore's*) account. It appeared that, at the time the defendants gave the undertaking, *Wrentmore* had 4,000*l.* in the hands of *Rain & Ramsay*, which the defendants expected to receive from them. But 1,262*l.* only was to be paid to the plaintiff, in consideration of his having agreed to release an attachment on the moneys of *Wrentmore*, viz. the 4,000*l.* which were to come into the defendants' hands from *Rain & Ramsay*. Taking the two documents together, I am of opinion, that the defendants were bound to pay the plaintiff the above sum of 1,262*l.* when they received the 2,000*l.* from *Rain & Ramsay*, in *February*, 1828. The defendants did not inform the plaintiff that they were creditors of *Wrentmore*, or that they had a lien on the moneys they expected to receive on his account, or that they anticipated the transmission of so large a sum as 4,000*l.* The defendants' undertaking must be coupled with the instructions which they had received from *Wrentmore*, and by which he requested them to pay the plaintiff when they should receive moneys on his (*Wrentmore's*) account. The defendants, however, deviated from these instructions, by inserting the words '*amount of moneys.*' But it is evident that *Wrentmore* himself intended that the plaintiff should be paid when the defendants received a sufficient sum from *Rain & Ramsay* to make such payment. There is a good consideration for the defendants' promise, as the plaintiff had an attachment on *Wrentmore's* moneys which were to

come into the defendants' hands, and which he had agreed to release on payment of the sum in question.

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Mr. Justice PARK.—I am of the same opinion. The two documents must be taken together and construed according to common sense, and as a man of ordinary understanding would read them. The undertaking by the defendants cannot be taken alone, as it referred to the instructions which they had received from *Wrentmore*, who authorized them to pay the plaintiff 1,262*l.* when they received moneys on *Wrentmore's* account, in consideration of the plaintiff's having agreed to release an attachment on such moneys; and the defendants themselves stated that the moneys to be received by them from *Rain & Ramsay*, on *Wrentmore's* account, were then under attachment by the plaintiff. If a person instructs his agent to do certain acts, and he accedes to the instructions in terms, it constitutes one entire contract, and cannot be used or taken separately. This, too, is a contract between mercantile men, and the consideration for the payment to the plaintiff is apparent on the face of *Wrentmore's* instructions to the defendants; and, as the plaintiff had an attachment on *Wrentmore's* property, which was about to come into the defendants' hands, he naturally expected that some benefit would result to him from such attachment; he therefore agreed to release it on payment of a certain sum which the defendants undertook to pay agreeably to *Wrentmore's* instructions, but which they refused to comply with, although they had received a sufficient sum for that purpose.

Mr. Justice BOSANQUET.—I am of opinion that the plaintiff is entitled to retain his verdict. The two documents, taken together, convey an expression of an intent by the defendants to pay the plaintiff 1,262*l.* 5*s.* 6*d.* on *Wrentmore's* account, as soon as they should have received

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from Messrs. *Rain & Ramsay*, of *New South Wales*, moneys in their hands belonging to *Wrentmore*, and then under attachment by the plaintiff. As the defendants did not pay it when they received a sufficient remittance for that purpose, they were guilty of a breach of faith, as they undertook to pay agreeably to *Wrentmore's* instructions, which were, to pay the plaintiff the above sum, when the defendants should receive moneys on *Wrentmore's* account. If the word *amount* had not been introduced by the defendants in their letter to the plaintiff, there would have been no room for doubt; and there can be no question but that the plaintiff's agreeing to release the attachment on *Wrentmore's* moneys which were about to come into the hands of the defendants, was a sufficient consideration for their undertaking.

Mr. Justice ALDERSON.—I entirely agree with the rest of the Court. *Wrentmore*, in his instructions to the defendants, requested them to pay the plaintiff 1,262*l.* out of certain moneys which should come to their hands from *Rain & Ramsay*, of *New South Wales*. No precise or definite sum the defendants were to receive, is specified, and it is admitted that they received 2,000*l.* in *February*, 1828. Taking both letters together, *Wrentmore* meant that the plaintiff should be paid 1,262*l.* 5*s.* 6*d.* in consideration of his having agreed to release the attachment; and when the defendants received a sufficient sum for that purpose, they should have complied with their undertaking; and if they had a lien on *Wrentmore's* property, it was their duty to have mentioned it to the plaintiff. The verdict therefore must stand, and this rule be—

Discharged.

Mr. Serjeant *Taddy*, and Mr. Serjeant *Stephen* then shewed cause against the rule obtained by Mr. Serjeant

Wilde, for increasing the verdict by adding the amount of interest on 1,262*l.* 5*s.* 6*d.*, from the time of the receipt of the 2,000*l.* by the defendants in *February*, 1828.—It is now settled, that interest is recoverable in four cases only—*first*, where there is a contract in writing for the payment of money on a certain day, as on bills of exchange or promissory notes—*secondly*, where there has been an express promise to pay interest—*thirdly*, where, from the course of dealing between the parties, such a promise may be inferred—*fourthly*, where it can be proved that the money has been used, and interest actually made of it. This case does not fall within either of those. In *Gordon v. Swan* (a), it was holden, that, though an agreement for the sale of goods which were afterwards delivered, gave a certain day of payment for the price, interest did not run upon the sum due from that day. Lord *Ellenborough* there said—"The giving of interest should, I think, be confined to bills of exchange and such like instruments, and to agreements reserving interest." In *Foster v. Weston* (b), where the defendants bound themselves by deed to pay 1,500*l.* to *R. D.* in goods, by three payments of 500*l.* each, at three, five, and seven months, it was held that the instrument did not carry interest. Although in *Arnott v. Redfern*, Lord Chief Justice *Best*, in delivering the judgment of the Court, said (c)—"In whatever shape a debt is contracted, if it has been wrongfully withheld from the plaintiff, he using means to obtain it, the Jury may give interest upon it, in the shape of damages for the unjust detention," yet there, interest was allowed on a judgment obtained in the Court of *Admiralty* in *Scotland*, which carried interest in that country, and the action was brought on the judgment upon which the promise was founded. Where a debt is

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(a) 12 East, 419.

(b) 6 Bing. 709.

(c) 11 J. B. Moore, 218; *S. C.*
3 Bing. 359.

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contracted abroad, interest must be paid according to the law of the country where the debt is contracted, and not according to that where it is sued for. Although it may be said that *Wrentmore* instructed the defendants that the payment was to be taken by the plaintiff in discharge of a bill of exchange, and that therefore he ought to be placed in as good a situation as if he had retained the bill, in which case he would have a right to claim interest from *Wrentmore* from the day it became due; yet there was no evidence that the plaintiff had given up the bill. In *Slack v. Lowell* (a), goods were to be paid for by a bill of exchange, and Sir *James Mansfield* said—"The question is, whether the defendant, who ought to have accepted a bill, which would have carried interest, shall be in a better situation by breaking his contract, than if he had performed it. The plaintiff is entitled to receive as much as if the defendant had accepted the bill, which would have carried interest." There, too, the defendant was the original debtor, whilst here the defendants are merely sureties for the payment of *Wrentmore's* debt, and are therefore entitled to the favour of the Court. In *Page v. Newman* (b), the defendant, who was residing in *France*, promised to pay the plaintiff, or order, the sum of 135*l.*, sterling, for value received, one month after the defendant's arrival in *England*; and it was held, that the plaintiff was not entitled to recover interest, and Lord *Tenterden* said—"I think that we ought not to depart from the long established rule, that interest is not due on money secured by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments." And in *Higgins v. Sargent*, his Lordship said (c)—"It is now established as a general principle, that interest is allowed by law only upon mercantile securities, or in those cases

(a) 3 Taunt. 157.

4 Man. & Ryl. 305.

(b) 9 Barn. & Cress. 378; S. C.

(c) 2 Barn. & Cress. 349.

where there has been an express promise to pay interest; or where such promise is to be implied from the usage of trade, or other circumstances." And here the undertaking by the defendants to pay the plaintiff is merely collateral, and is not embodied in a mercantile instrument; nor were they the original debtors of the plaintiff.

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Mr. Serjeant *Wilde*, and Mr. Serjeant *Spankie*, in support of the rule.—Although there was no express contract by the defendants to pay the plaintiff interest, yet he is entitled to it according to the principle laid down by Lord Chief Justice *Best* in *Arnott v. Redfern*, as they withheld the payment of the debt due from *Wrentmore*, although they had received funds sufficient to satisfy it, and although the plaintiff had required payment. The Jury therefore might and ought to have given the plaintiff interest in the shape of damages for the unjust detention by the defendants. If they had guaranteed the payment of *Wrentmore's* bill, the case would be free from doubt; but, independently of that, it must be implied that interest was payable, from the particular circumstances, as well as the intention of the parties. The defendants undertook to pay the plaintiff a certain sum, agreeably to instructions from *Wrentmore*, which were, that the payment was to be in discharge of a bill given by him to the plaintiff, payable at nine months' date, from the 1st *October*, 1827. If, therefore, the plaintiff had sued *Wrentmore* on the bill, he would have been entitled to interest from the day the bill became due, and in case of the plaintiff's recovering from *Wrentmore*, he might have charged the defendants with interest, as they had money of *Wrentmore's* in their hands before the bill became due. The defendant's undertaking is in effect a contingent guarantie to pay *Wrentmore's* bill when they should receive moneys, agreeably to his instructions, which were, to have the bill given up at the time of payment, which was to be a sufficient discharge. This case, there-

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fore, falls within the principle of *Slack v. Lowell*, viz. that, where goods are sold, to be paid for by a bill of exchange, and the purchaser neglects to give the bill, the vendor is entitled to interest from the time when the bill, if given, would have become due; and here the defendants had moneys of *Wrentmore's* in their hands before the bill became payable.

Lord Chief Justice TINDAL.—If this had been a direct guarantie by the defendants to pay the bill of exchange when due, they would have stood in the same situation as the original parties to it, and consequently would have been liable for interest. But this was not a direct undertaking by the defendants to pay the bill; their letter to the plaintiff contains no reference to the bill. The instructions by *Wrentmore* to the defendants merely mentions the bill as an outstanding security which the defendants were directed to call in at the time of payment. It could not have been the intention of the parties that interest should be paid; for, by the instructions, the defendants were limited to the payment of a precise sum; upon payment of which, they would have been completely discharged. Besides, at the time the defendants undertook to pay the amount, it was doubtful whether the plaintiff would, even as against *Wrentmore*, be in a situation to demand interest; for the sum was to be taken in discharge of the bill, and the money might have arrived before it became due.

Mr. Justice PARK.—I am of the same opinion. This does not fall within that class of cases where interest has been held to be recoverable. The rule was accurately and clearly laid down by Lord *Ellenborough*, in the case of *De Havilland v. Bowerbank*. His Lordship there said (a)—“It appears to me, that interest ought to be allow-

(a) 1 Camp. 51,

ed only in cases where there is a contract for the payment of money on a certain day, as on bills of exchange, promissory notes, &c.; or where there has been an express promise to pay interest; or where, from the course of dealing between the parties, it may be inferred that this was their intention; or where it can be proved that the money has been used, and interest has been actually made." No part of that rule applies to this case: and, said his Lordship—" Mr. Justice *Buller*, in one instance, allowed interest on a policy of insurance; but I believe that he was there thought to have done wrong. My great object is, to have a fixed rule, and to exclude discretion (a)." In *Arnott v. Redfern*, this Court held interest to be recoverable on a *Scotch* judgment, inasmuch as it carried interest in *Scotland*. Although I concurred in the judgment delivered in that case, yet it contains some general expressions with which I did not fully coincide at the time it was pronounced; and, in *Page v. Newman*, Lord *Tenterden* said (b)—" If we were to adopt as a general rule, that which some of the expressions attributed to the Lord Chief Justice of the *Common Pleas* in *Arnott v. Redfern*, would seem to warrant, *viz.* that interest is due wherever the debt has been wrongfully withheld, after the plaintiff has endeavoured to obtain payment of it, it might frequently be made a question at *Nisi Prius*, whether proper means had been used to obtain payment of the debt, and such as the party ought to have used. That would be productive of great inconvenience." Still, however, I

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(a) But it is now settled, that, in an action on a policy, the plaintiff cannot recover interest upon the sum insured. *Kingston v. McIntosh*, 1 Camp. 518. And in *Bain v. Case*, 3 Car. & Payne, 496, S. C. 1 Mood. & Malk. 262, Lord *Tenterden* held, that the

plaintiff could not recover interest unless evidence be given that he had applied to the under-writer to settle the loss soon after it happened, and notified to him the ground of such application.

(b) 9 Barn. & Cress. 380.

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think that the principle on which *Arnott v. Redfern* was decided, is correct.

Mr. Justice BOSANQUET.—I am also of opinion that the plaintiff is not entitled to interest upon this undertaking. It is desirable that new and refined distinctions should not be introduced into the law upon this subject. It has been contended that interest is payable because this was in effect an undertaking for the payment of a bill of exchange. But that is not so; the undertaking was merely collateral, *viz.* to pay a certain sum on a given event, namely, on the receipt of certain moneys from Messrs. *Rain & Ramsay*, of *New South Wales*. If the money had arrived and been paid before the bill became due, the plaintiff would in no event have been entitled to interest.

Mr. Justice ALDERSON concurred—

Rule discharged.

Friday,
 Jan. 21st.

DOE, on the demise of CLARKE, v. LUDLAM.

Since the statute 55 Geo. 3, c. 192, a copyhold estate will pass under a general devise of all the testator's real estate, although there was no previous surrender to the use of his will.

THIS was an action of ejectment. At the trial of the cause before Mr. Justice *Gaselee*, at the last Assizes at *Lincoln*, a nonsuit was entered, with liberty to enter a verdict for the plaintiff, subject to the opinion of the Court, on the following case:—

“ On the 6th of *March*, 1830, *George Ludlam*, late of *Crowle*, in the county of *Lincoln*, being then seised in fee of a freehold estate at *Crowle*, and also of three copyhold messuages or dwelling houses at *Crowle*, being part and

parcel of the manor of *Crowle* in the said county, made and executed his last will, which, after bequeathing several pecuniary legacies, proceeded as follows:—‘ I give and bequeath unto my housekeeper, *Mary Riggle*, of *Luddington*, in the said county of *Lincoln*, the legacy or sum of 5*l*. I give and devise unto the said *Mary Riggle*, the west end or part of my dwelling-house at *Crowle* aforesaid, now in the occupation of *Fanny Loughton*, to and for her use, and during the term of her natural life; and at her decease I give and devise the same premises to my executor hereinafter named, and I direct that the legacies hereinbefore bequeathed shall be paid by my executor hereinafter named, at the end of twelve calendar months next after my decease. I give, devise, and bequeath unto *John Clarke*, of *Epsworth*, in the said county of *Lincoln*, the whole of my real and personal estates and effects whatsoever and wheresoever, which I may be possessed of at the time of my decease, subject to the payment of the legacies hereinbefore bequeathed, and to his heirs and assigns for ever; and I do hereby appoint the said *John Clarke* sole executor of this my last will, and revoke and make void all former wills and testamentary dispositions by me at any time before made, and declare this to be my last will and testament. In witness whereof, I have hereunto set my hand,’ &c.

“ The will was attested by only two witnesses. The testator died seised of the above freehold and copyhold estates, without having made any surrender to the uses of his will. *John Clarke*, the person named in the will as devisee and executor, being the lessor of the plaintiff in the present action, was a stranger in blood to the testator, but had intermarried with one of his nieces. The dwelling-house, of which the west end or part was specifically devised by the will to *Mary Riggle* for life, with remainder to the lessor of the plaintiff, was one of the three copyhold messuages above mentioned. By the custom of the

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manor, copyhold estates of intestates descend in like manner as freehold, and they were devisable by will previously to the statute 55 Geo. 3, c. 192. Surrender having been made subsequently to the death of the testator, and prior to the day of the demise laid in the declaration, the lessor of the plaintiff was admitted tenant to the copyholds in question, being the east end of the last-mentioned dwelling-house, and the other two messuages, as devised under the will. The defendant, *John Ludlam*, was the heir-at-law and customary heir of the testator."

The question for the opinion of the Court was, "whether or not the copyhold messuages mentioned in the will passed thereby to the lessor of the plaintiff. If the Court should be of opinion that the copyhold messuages did so pass to the lessor of the plaintiff, the verdict was to be entered for the plaintiff as aforesaid; but, if the Court should be of a contrary opinion, then the nonsuit was to stand."

The case now came on for argument.

Mr. Serjeant *Wilde*, for the plaintiff.—It is quite clear that the testator did not mean to die intestate as to any part of his property. The devise in fee to *Clarke*, whom the testator appointed his executor, of the whole of his real and personal estates and effects whatsoever and wheresoever, which he might be possessed of at the time of his decease, is in as large and general terms as can possibly be conceived, and sufficient to embrace the whole of the testator's freehold property, as well as his copyhold estates; and he certainly intended that the three copyhold messuages should pass by his will to the lessor of the plaintiff, as residuary devisee, with the exception of the west end of one of such messuages, which he devised to *Mary Riggle* for her life, with remainder to *Clarke*, in fee. Although, before the passing of the statute 55 Geo. 3, c. 192, the rule was, that, if a copyhold estate were

not surrendered by a testator to the use of his will, it would not pass under a general devise of lands, or any general words descriptive of real estate, unless the deviser had no freehold lands upon which the devise could operate; yet, a devise of lands generally, would pass copyholds surrendered to the use of the will, whether the deviser had freehold lands or not: from which it is evident that it was the absence of the surrender, and not the incapacity of a general devise to pass copyholds, to which the inefficacy of the devise was owing; for, as a will could only operate upon them by directing the uses of the surrender, the Courts reasonably inferred from the absence of the latter, that the deviser did not mean them to pass, unless this were repelled by the stronger presumption that he must have intended the devise to act upon some property. But this reasoning cannot now apply, as the statute 55 Geo. 3, by dispensing with the necessity of surrenders to the use of wills, has placed freeholds and copyholds *in pari passu*, as far as regards the operation of a general devise (a). As, therefore, it is evident that the copyhold dwelling-houses in question would have passed before the statute, if the testator had surrendered them to the use of his will, such surrender being now altogether dispensed with, it is equally clear that they passed to the plaintiff as residuary devisee, under the general words of this devise. Although it has been decided that the statute extends only to surrenders in point of form, as in *Doe d. Nethercote v. Bartle* (b), where, by the custom of a manor, a married woman was allowed by will to pass her copyhold lands, the same having been previously surrendered by husband and wife (the wife having been examined separate and apart from her husband, and con-

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(a) See the 1st and 3rd sections of this statute, *post*, p. 59.

(b) 5 Barn. & Ald. 492; S. C. 1 Dow. & Ryl. 81.

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senting), to the use of her will, and she, being seised of copyhold lands in the manor, made her will subsequently to the passing of the statute 55 *Geo. 3*, but there was no surrender to the use of her will—it was held that the copyholds did not pass by the will, the statute having only supplied the want of a formal surrender, and the surrender in question being matter of substance, and requiring to be accompanied by the separate examination of the wife. There, however, the surrender being matter of substance, was intended to protect the acts of a married woman, which protection the Legislature did not intend to interfere with, or to take away. But, as the express object of the act was to remove certain difficulties in the disposition of copyhold estates by will, the Court will give it its fullest effect, and hold, that, in the case of a general devise, a copyhold estate may pass to a devisee without a previous surrender by the party disposing of it to the use of his will.

Where a testator uses words which are competent to pass all his estate, an intention to convey such estate must be inferred; and here, the words of the devise to the residuary devisee are sufficiently large to convey the testator's equitable interest in the three copyhold messuages to him, without having recourse to any evidence of intention. In *Hawkins v. Leigh*, Lord *Hardwicke* said (a): "It has been said, a will is sufficient to pass an equity in copyhold lands, as well as an equity in freehold lands, though there should be no surrender to the use of the will; and the observation is just." And although a Court of Equity would not supply the defect of a surrender in favour of a wife or younger children, to the disherison of an heir where he is not provided for; yet, in *Car v. Ellison*, Lord *Hardwicke* said (b): "The trust of copyhold estates will pass without a surrender to the uses of the will; be-

(a) 1 Atk. 388.

(b) 3 Atk. 75.

cause the surrender must be by the person who has the legal estate; and when there is no legal estate in the party who has the beneficial interest, it may pass by a will as well as any other lands." In the will now before the Court, there is a sufficient indication of the testator's intention that the residuary devisee should have the whole of his real and personal estates, and the words of the devise are large enough to pass the copyhold messuages, to which the lessor of the plaintiff was properly admitted tenant. But, as the necessity of a surrender to the use of a will is now wholly taken away by the statute 55 Geo. 3, no evidence of intention is necessary; for, as Lord Eldon said in *White v. Vitty* (c)—"As the act makes a surrender unnecessary for a devise of copyholds, it may be a question whether the surrender can now be considered as any evidence of an intention that copyholds should pass by the devise, since, under a will containing sufficient words to pass them, they would pass equally (as the law now exists), whether they were or were not surrendered." Here, therefore, although there was no surrender by the testator to the use of his will, it does not negative his intention to devise his copyhold estate; and the words of the will are large enough to shew that he fully intended that the whole of his real estates should pass to the executor named in his will, subject to the payment of certain legacies, and a bequest of part of one of the copyhold dwelling-houses to his housekeeper for her life.

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Mr. Serjeant *Scriven, contra.*—The only object of the statute 55 Geo. 3, was, to dispense with the necessity of the surrender of a copyhold estate by the testator to the use of his will, but not to supply evidence of an intention by him that such estate should pass. It is, therefore, necessary, in the first place, to consider the terms of the will, the construction to be put on it before the passing of

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the act, and also, the general effect of that statute. There is nothing on the face of the will to shew that the testator meant to pass his copyhold estate; and it is clear that he did not intend that the residuary devisee should take an interest in the whole of the copyhold messuages, but of a part only, as the west end of one of the houses was devised to *Mary Riggle*, for her life; and the devise to *Clarke* is confined to the testator's real estate, which of itself is not sufficient to pass copyhold messuages or dwelling houses, particularly as he was seised of a freehold estate at *Crowle*. In *Chapman v. Hart (a)*, the testator devised all his lands and tenements in or near *Fowey*, to the plaintiff; and the will, as here, was executed in the presence of two witnesses only; and on its being insisted that it was sufficient to pass leasehold lands or tenements, Lord *Hardwicke* said—"It is clear, since the case of *Rose v. Bartlett*, that such a devise should be confined to the freehold, and the leasehold should not pass, unless there were only leasehold; for then they should, that the will may have some effect. Suppose a case (which, though I do not know to be determined, I should not doubt to determine so) of a person seised of freehold and copyhold in *D.*, who surrenders to the use of his will, and devises all his lands and tenements in *D.* to a child: there being a surrender, both freehold and copyhold would pass, if the will was duly executed according to the statute of frauds; but, if no surrender to the use of the will, only the freehold would pass; to which *lands* and *tenements* generally mentioned shall be applied; there being no surrender to the use of the will, to shew a different intent. Suppose that will executed in the presence of two witnesses, or of one only; those general words used; and no surrender: though this were to a child or wife, the Court would not supply the defect of surrender to the use of the will, or compel the heir-at-law to surrender the copyhold to the devisee, be-

(a) 1 Vez. sen. 271.

cause the will was not duly executed, when, if duly executed, the Court would not have supplied that defect; for such variation of the construction would be very dangerous, and might make terms, and perhaps terms attendant on the inheritance, to pass." So, in *Byas v. Byas* (a), the Master of the Rolls (b) said—"There is no case where there is freehold as well as copyhold, and no notice taken of the copyhold in the will, that the Court has supplied the want of surrender. Without surrender to the use of the will, or mention of copyhold, the Court will not take it from the heir." In *Church v. Mundy* (c) it was decided that a devise of a remainder or reversion requires a surrender to the use of the will; and there the Court would not supply the want of a surrender, although the testator devised his real and personal estate to his wife. In *Sampson v. Sampson* (d), the Court would not supply a surrender for a child, under a devise in general terms, not mentioning a copyhold estate, and the will not being executed to pass the freehold; and the Vice-Chancellor (e) said—"Though, generally, where there are both freehold and copyhold estates, and the copyholds are not surrendered, nor mentioned in the will, they shall not pass; it is contended, that, this will being attested by two witnesses only, a different rule is to prevail. This is not the case of supplying a surrender for creditors; and there is no instance of doing it for a wife or child, where copyhold estate was not expressly mentioned in the will. *Byas v. Byas*, and many other cases, shew that this was always required, that no implication from words, however large and general, would do without the term 'copyhold,' though a probable intention might appear to comprehend both freehold and copyhold." In *Lindopp v. Eborall* (f), it was held

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(a) 2 Vez. sen. 165.

(b) Sir John Strange.

(c) 12 Ves. 426.

(d) 2 Ves. & Beames, 337.

(e) Sir Thomas Plumer.

(f) 3 Brown's Chan. Cas. 187.

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that a copyhold estate would not pass by general description, where there was freehold to satisfy the words of the will; although it had been supposed to be freehold, and the first devise was for payment of debts, and then given to a younger child otherwise provided for. In *Judd v. Pratt*(a), where a testator devised all the rest, residue, and remainder of his real and personal estate, of what nature or kind soever, to nephews and nieces, not being for creditors, wife, or children, it was held not to be sufficient to supply the want of a surrender of a copyhold estate, contiguous and intermixed with the freehold, as against the heir; and, when that case afterwards came before the Lord Chancellor, upon an appeal from a decree pronounced at the Rolls by Lord *Manners*, then Baron *Sutton*, his Lordship affirmed the decree (b). And in *Wentworth v. Cox*, the Vice-Chancellor said (c)—“A general gift of all my estate, *primâ facie* passes such estate only as the nature of the instrument is calculated to pass. A general devise of all real estate, passes copyholds surrendered.” That case was decided since the statute 55 *Geo. 3* was passed, whence it must be inferred that a surrender is still necessary to pass a copyhold estate, if the testator has a freehold to which a devise of his real estate would apply. In *White v. Vitty*, the language of the Lord Chancellor is cautious and guarded; for he merely says, that *it may be a question* whether the surrender can now be considered as any evidence of an intention that copyholds should pass by the devise; and in a subsequent report of that case his Lordship said (d), that, as he understood that all the testator’s copyhold estates were surrendered to the use of the will, he thought that the copyhold went to the residuary devisee, after the payment of certain legacies. In *Hawkins v. Lee*, it was expressly decided, that, where

(a) 13 Ves. 168.

(b) 15 Ves. 395.

(c) Madd. & Gildart, 364.

(d) 4 Madd. Appendix, 586.

there is no surrender of copyhold lands to the use of the will, they will not pass by a general devise of lands. And in *Car v. Ellison*, the material circumstance was the intention of the testator to restore the estates to the wife from whom they originally came, and therefore he could not mean to dismember and sever the copyhold estate from the freehold. The Lord Chancellor on that ground decreed, that the copyhold passed to the trustees by the general words of the will. Here, however, there were no general words to pass the copyhold messuages to the residuary devisee, nor has the testator expressed any intention that they should pass to him; and, as he had a freehold estate, the Court will not supply the want of a surrender, especially as there are words in the will which may answer the intention of the testator not to pass them; for, as was said by the Lord Chancellor, in *Hawkins v. Leigh* (a)—“Copyhold lands are not properly the subject of a devise, as they pass by the surrender, and not by the will.” In the late case of *Doe d. Nethercote v. Bartle*, Lord Chief Justice Abbott said: “I am of opinion that the Legislature intended by this statute (b) to supply the want of a mere formal surrender only;” and Mr. Justice Bayley said: “The enacting part of the statute contains large and general words; but the recital refers to the particular inconvenience intended to be remedied. That inconvenience was, that a will expressly devising copyholds was inoperative where the testator had omitted to make a surrender to the uses of his will. The surrender in such a case was mere matter of form; and I am of opinion that the statute meant to supply the want of a surrender in such cases only, and not where it was a matter of substance.” Courts of law invariably adhere to general rules which have been established as to the construction of wills, and it is a well known and re-

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(a) 1 Atk. 388.

(b) 55 Geo. 3.

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cognised principle, that an heir is not to be disinherited, unless there are express words in the will, or a necessary implication to that effect; and here, as the testator has specifically devised a part of his copyhold estate to his housekeeper for the term of her life, he manifested his intention not to devise the remainder to the residuary devisee. It therefore passed to the customary heir; and as his title is founded on the laws of descent, which are certain, it is not to be defeated by an uncertain devise.

Mr. Serjeant *Wilde*, in reply, was stopped by the Court.

Lord Chief Justice TINDAL.—I entirely agree with the observation made by the counsel for the defendant, as to the necessity of adhering to general rules in the interpretation of wills. It is highly expedient that those rules should be held sacred; because they tend to restrain the particular views of the Judge in each particular case, and to preserve an uniformity of decision. The hardship and inconvenience that may occasionally result from an adherence to those rules, will be infinitely less than the confusion which must naturally follow by a departure from them. In the present instance, however, there is no necessity for breaking in upon the rule which was first established in *Rose v. Bartlett* (a)—viz. “That, if a man hath lands in fee, and lands for years, and deviseth all his lands and tenements, the fee-simple lands pass only, and not the lease for years; and, if a man hath a lease for years, and no fee-simple, and deviseth all his lands and tenements, the lease for years passeth: for, otherwise, the will should be merely void.” In *Chapman v. Hart*, Lord Hardwicke exemplifies the rule in the case of copyholds. He says (b)—“Suppose a case of a person seised of freehold and copyhold in *D.*, who surrenders to the use of his will, and de-

(a) Cro. Car. 293.

(b) 1 Ves. sen. 273.

vises all his lands and tenements in *D.* to a child: there being a surrender, both freehold and copyhold would pass, if the will was duly executed according to the statute of frauds: but, if no surrender to the use of the will, only the freehold would pass; to which *lands and tenements* generally mentioned shall be applied; there being no surrender to the use of the will, to shew a different intent. Suppose that will executed in the presence of two witnesses, or of one only; those general words used; and no surrender: though this were to a child or wife, the Court would not supply the defect of the surrender to the use of the will, or compel the heir-at-law to surrender the copyhold to the devisee, because the will was not duly executed; when, if duly executed, the Court would not have supplied that defect." Now, we are called upon to give judgment in a case where the act of a surrender is dispensed with, or rendered nugatory by the Legislature; for, by the statute 55 *Geo. 3*, c. 192, it is enacted—"That, where any copyhold tenant by the custom of any manor in *England* or *Ireland*, may, by will, dispose of or appoint his copyhold tenements, the same having been surrendered to such uses as should be declared by such will; every disposition or charge made, or to be made, by any such will, shall be as valid and effectual to all intents and purposes, although no surrender shall have been made to the use of the will of such person, as the same would have been if a surrender had been made to the use of such will." So cautiously was the statute framed, in order to give the fullest possible effect to that enactment, that, by the last clause, it is provided—"That nothing in the act contained shall be construed, deemed, or taken, at law or in equity, to render valid and effectual any devise or disposition of any copyhold lands, &c., which would be invalid or ineffectual if a surrender had been made to the use of the will of the person attempting to dispose of the same by will." Where, therefore, a sur-

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render alone is necessary, the act supplies it. Before the passing of that statute, a formal surrender was requisite as evidence of the testator's intention to devise. Since the act, it is no longer necessary. Were we to hold otherwise, we should be giving the statute a more limited operation than the Legislature intended; for, since the passing of that act, what attorney, sitting at the bed-side of a testator would hesitate to use general words, which, before the statute, would have been sufficient to pass a copyhold estate, in the case of a surrender to the use of the will? Confining my opinion, therefore, to the general question arising on the construction of the statute, I think that our judgment should be for the lessor of the plaintiff, and, consequently, that a verdict must be entered for him.

Mr. Justice PARK.—We are most anxious to guard ourselves from expressing any opinion beyond the construction of the statute 55 *Geo. 3*, which is a most useful and beneficial act, as it dispenses with the necessity of a previous surrender to the use of a will, in the case of a devise of a copyhold estate, and has placed freeholds and copyholds *in pari passu*, as far as regards the operation of a general devise. In the case of *Doe d. Nethercote v. Bartle*, the Court of *King's Bench* drew a distinction between a mere formal or technical surrender, and a surrender in substance; for, Lord Chief Justice *Abbott* there said (a)—“Here, the surrender is matter of substance. I am of opinion that the Legislature intended by this statute to supply the want of a mere formal surrender only:” and Mr. Justice *Bayley* said—(b) “The enacting part of the statute contains large and general words, but the recital refers to the particular inconvenience intended to be remedied. That inconvenience was, that a will expressly devising copyholds was inoperative where the testator had omitted to make a

(a) 5 Barn. & Ald. 502.

(b) *Ibid.* 504.

surrender to the uses of his will. The surrender in such a case was a mere matter of form; and I am of opinion, that the statute meant to supply the want of a surrender in such cases only, and not where it was a matter of substance. Here, the surrender, coupled with the separate examination of the wife, is a matter of substance. I am quite satisfied that the Legislature did not mean to take away that protection which such a surrender is calculated to afford to *femes covertes*. It is the duty of the stewards of the manors in such cases to take care that no *feme coverte* is suffered to surrender an estate to the uses of a will, without previously apprising her of the consequences of that act." Here, however, we are only required to supply the want of a mere formal surrender, which the statute no longer considers necessary. The verdict, therefore, must be entered for the plaintiff.

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Mr. Justice BOSANQUET.—I am of the same opinion. There can be no doubt but that the words of the residuary clause would have been sufficient to pass the testator's copyhold messuages, before the passing of the statute 55 Geo. 3, if he had made a previous surrender to the use of his will. Nothing, therefore, was wanting in addition to the will, to pass the messuages in question, but a formal surrender, the necessity of which is now dispensed with; as the preamble of the statute—after reciting, that, by the customs of certain manors, copyhold estates of such manors passed by the last will and testament of the copyhold tenants thereof declaring the uses of surrenders made for that purpose; and that much inconvenience had arisen from the necessity of making such surrenders—enacts, "that, where any copyhold tenant of such manor may by his will dispose of his copyhold tenements, the same having been surrendered to such uses as should be declared by such will, every disposition made by such will shall be as

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valid and effectual to all intents and purposes, although no surrender shall have been made to the use of the will of such person, as the same would have been if a surrender had been made to the use of such will." Here, therefore, although there was no surrender by the testator to the uses of his will, yet the plaintiff is placed in the same situation as if there had been; and as the words of the residuary clause would have been sufficient to pass the copyhold estate to him as the devisee therein named, if it had been surrendered to the use of the will, before the statute was passed, the necessity of such a surrender being now altogether dispensed with, he is equally entitled to recover. The verdict, therefore, must be entered for him accordingly.

Mr. Justice ALDERSON.—I entirely concur with the rest of the Court. Before the statute 55 Geo. 3 was passed, it was necessary to the legal operation of a devise of copyholds, that they should have been surrendered to the use of the will, and the established rule was, that copyholds not so surrendered would not pass under a general devise of lands, or other words descriptive only of real estate, unless the testator had no freehold lands upon which the devise might operate. But, when the late statute has in effect supplied the want of a surrender, and placed freeholds and copyholds on the same terms, as far as regards the operation of a general devise, the objection can no longer prevail; and the cases which were decided previously to the statute, have no application to the question now before the Court. Independently of the requisition of a surrender, it was never doubted that a copyhold estate did not fall as properly and technically under the description of lands, or real estate, as freeholds; and the equitable interest in a copyhold, of which no surrender was necessary, has been held to pass with a freehold under the general description of all the testator's other real es-

tate, although the devise was without impeachment of waste: and here, it appears that the testator died seised of freehold and copyhold estates, and he intended that both should pass according to the uses declared, and to the parties named in the will.

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Judgment for the lessor of the plaintiff.

INNES v. ROBERT COLQUHON.

THIS was an action of replevin.—The declaration was in the usual form, for taking the plaintiff's goods in his dwelling-house. The avowry was as follows:—

“And the said *Robert*, (the defendant), by —, his attorney, comes and defends the wrong and injury when &c., and well avows the taking of the said goods and chattels in the said dwelling-house in which &c., and justly &c., because he says, that the said plaintiff, for a long time, to wit, for the space of one year next before and ending on the 24th *June*, 1830, and from thence until and at the said time when &c., held and enjoyed the said dwelling-house in which &c., with the appurtenances, as tenant thereof *and the said Robert*, by virtue of a certain demise thereof to him the plaintiff theretofore made at and under a certain yearly rent, to wit, the yearly rent of 57*l.* 15*s.* payable quarterly, to wit, on &c., &c., and because a large sum, to wit, the sum of 57*l.* 15*s.* of the rent aforesaid, for four quarters ending on &c., and from thence until and at the said time when &c., was due and in arrear from the said plaintiff to the said *Robert*, he, the said *Robert*, well avows the taking of the said goods in the said dwelling-house in which &c., and justly &c., as for and in the name of a distress for the said rent so due and in arrear as afore-

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It is not necessary that an avowry for rent in arrear should allege in precise terms that the plaintiff was tenant to the avowant; if the fact of the tenancy can be collected from the whole of the avowry, it is sufficient.

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said *and the said Robert &c.* And this the said *Robert* is ready to verify, wherefore &c."

To this avowry the plaintiff demurred specially, assigning, among other causes, that it was not stated or alleged of whom the plaintiff held the dwelling-house in which &c. as tenant.

The defendant joined in demurrer.

Mr. Serjeant *E. Lawes*, in support of the demurrer. —In an avowry or cognizance for rent in arrear, the nature of the tenancy or holding must be accurately described; and here the defendant has not alleged or shewn to whom the plaintiff was tenant, or that he held the premises in respect of which the distress was made, as tenant to the avowant. Although a general avowry is sufficient, since the statute 11 *Geo. 2*, c. 19, s. 22, yet the issue between the parties is not merely whether the plaintiff is tenant of the premises, but whether he holds under the defendant or avowant; and here, although it may be said that the avowry is sufficient, as the defendant has alleged that a certain sum was due and in arrear from the plaintiff to him for rent, yet the Court will not infer that the plaintiff was tenant to the defendant; and if the avowry can be supported, *non tenuit* would be a bad plea, as the defendant has not alleged that the plaintiff held the premises as tenant to him.

Lord Chief Justice TINDAL.—On reading the whole of this avowry, it is impossible not to perceive that the word 'and' has crept in by mistake for the word 'to.' By its introduction it has rendered the avowry unintelligible throughout. But, independently of this, it appears to me that there is a sufficient allegation of a demise to the plaintiff. The defendant well avows the taking, because he says that the plaintiff, for one year next before and

ending on the 24th *June*, 1830, and from thence until and at the time when &c., held the house in which &c., as tenant thereof. If we reject the words "*and the said Robert*" as surplusage, we may collect from the words which immediately follow, that the plaintiff was tenant to the defendant. The allegation in substance being, that the plaintiff, at the time when &c., held the house as tenant thereof, by virtue of a demise thereof, theretofore made to the plaintiff, at and under a certain yearly rent, to wit, the yearly rent of 57*l.* 15*s.*, and that because a large sum, to wit, 57*l.* 15*s.* of the rent aforesaid, was due and in arrear from the plaintiff to the defendant, he the defendant well avowed the taking &c. Now, "the rent aforesaid" must refer to the rent which accrued due under the demise; and if rent were due from the plaintiff to the defendant, as accruing under a demise of premises which the former still occupied, it could only be due from him in his capacity of tenant to the defendant.

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The rest of the Court concurring—

Judgment for the avowant (a).

(a) It appeared by affidavit, that the avowry was originally drawn correctly, and that the word '*and*' had been introduced by the stationer by mistake, in engrossing the pleadings.

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Charges by an attorney for attending the defendant and advising him, he having been served with a writ after paying the amount of the debt; and attending him, and advising on an action that had been brought against him at the suit of *M.*, are taxable items, and within the statute 2 Geo. 2, c. 23, s. 23. So, a sum advanced by the attorney to the defendant to discharge the debt and costs in *M.*'s action, is a disbursement within that statute; and the attorney cannot recover it in an action for money lent, although it was not included in his bill.

SMITH v. TAYLOR.

THIS was an action for work and labour by the plaintiff as an attorney, and by which he sought to recover the sum of 53*l.* 3*s.* 7*d.* for business done for the defendant, and for money lent. At the trial, before Lord Chief Justice *Tindal*, at *Guildhall*, at the adjourned Sittings after the last *Trinity* Term, it appeared that the bill of costs had not been delivered by the plaintiff to the defendant, a month previously to the commencement of the action, as required by the statute 2 Geo. 2, c. 23, s. 23 (a), but the following items were incorporated in the bill:—

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You having been applied to by the petitioning creditor to concur with him in what he had done, attending you thereon and advising; you were determined to petition and bring an action unless you could get good terms, and you instructed me to act accordingly.

6*s.* 8*d.*

(a) By which it is enacted—
“That no attorney of his Majesty's Court of King's Bench, Common Pleas, or Exchequer, &c. &c., or any other Court of record in *England* wherein attorneys have been accustomedly admitted and sworn, nor any solicitor in any Court of equity, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements at law or in equity, until the expiration of one month or more after such attorney or solicitor respectively shall

have delivered unto the party or parties to be charged therewith, or left for him, her, or them, at his, or her, or their dwelling-house, or last place of abode, a bill of such fees, charges, and disbursements, written in a common legible hand, and in the *English* tongue (except law terms and names of writs), and in words at length (except times and sums); which bill shall be subscribed with the proper hand of such attorney or solicitor respectively.”

Nov. 6. You having been served with a writ,
after paying the amount of debt; attend-
ing you, conferring and advising there-
on. - - - - - 6s. 8d.

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Dec. 10. Attending you, advising you upon
the action that had been brought against
you at the suit of *Mather*, and advis-
ing. - - - - - 6s. 8d.

For the defendant, it was objected that these were tax-
able items, and therefore that the action could not be
maintained, as the plaintiff had not delivered his bill one
month previously to the action being brought, as required
by the statute 2 Geo. 2, c. 23.

The Lord Chief Justice being of opinion that the ob-
jection was well-founded, was about to nonsuit the plain-
tiff, when he called a witness who proved that the plaintiff
had lent the defendant 3*l.* to make up a sum to pay the
debt and costs in *Mather's* action, and which sum was
not included in the bill delivered. But his Lordship
thought that this was a disbursement contemplated by the
Legislature, and within the meaning of the statute, and
that it could not be severed from the other part of the
plaintiff's claim or demand. He accordingly directed a
nonsuit, reserving leave to the plaintiff to move to set it
aside, and that a verdict might be entered for him for the
amount of his bill, or for the 3*l.*, being the sum advanced
to the defendant, as the Court might direct.

Mr. Serjeant *Taddy*, in the last term, accordingly ob-
tained a rule *nisi* that the nonsuit might be set aside, and
a verdict entered for the plaintiff, for 53*l.* 3*s.* 7*d.*, or a new
trial had, or that the verdict might be entered for 3*l.*; on
the ground that neither of the items were of such a nature
as to render the bill taxable; or that, at all events, the

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plaintiff was entitled to recover the sum advanced to the defendant; as it was a distinct and separate claim, and not included in the bill.

Mr. Serjeant *Spankie* now shewed cause.—Although an attorney's bill for business in bankruptcy need not be delivered one month before action brought, pursuant to the statute 2 Geo. 2, c. 23, according to the decision of the Court of *Exchequer*, in the late case of *Crowder v. Davies* (a), yet the two last items which were incorporated in the bill are clearly taxable, and draw all the other charges after them, and the plaintiff cannot recover on any separate item. His attending and advising the defendant, after he had been served with a writ; and again attending and advising him on the subject of an action that had been commenced against him, are charges for business done in the progress of a suit; and it is immaterial whether the business were done in a court of law or equity, as they are fees, charges, or disbursements, within the meaning and operation of the statute. In *Watt v. Collins* (b), charges by an attorney for attending the proposed bail of the defendant, and examining them as to their competency to justify, and attending the plaintiff in several actions commenced against the defendant, and arranging with him to take *cognovits* therein, were held to be taxable items within the statute. There, none of the items showed that the plaintiff had conducted any proceeding in Court; but Lord Chief Justice *Best* said: "One item shows that the defendant was in immediate want of bail, and that the plaintiff attended the persons proposed, for the purpose of arranging their becoming bail. A cause, therefore, must have existed, in which the plaintiff, as an attorney, furnished his assistance to the defendant. But this is conclusively shewn by the items, which expressly state that ac-

(a) 3 Younge & Jerv. 433.

(b) 1 Ryan & Mood. 284.

tions were then commenced against the defendant." So here, a writ had been served on the defendant, and the plaintiff afterwards attended him, and advised upon an action brought against him. In *Winter v. Payne* (a), it was decided, that, if any part of an attorney's bill be for business done in Court, the bill must be delivered a month before the action is brought; and, as one of the charges was for drawing and engrossing an affidavit of debt, in order to hold a party to bail, which appeared to have been sworn, it was held to be a charge for business done in Court, which made the bill taxable. Although, in *Mowbray v. Fleming* (b), where an attorney had not delivered any bill to his client before action brought, but had afterwards delivered a bill of particulars under a Judge's order, it was held that he was entitled to recover charges for money paid for his client's use, they having no reference to his business of an attorney, although other items in the bill of particulars were taxable; yet, there, the charge was for cash paid by the attorney for the stage hire of the defendant's son, which had no reference whatever to the business of an attorney; whilst here, it was proved that the sum advanced by the plaintiff to the defendant, was to enable him to discharge the debt and costs in the action brought against him by *Mather*, which was a disbursement in the cause, and within the meaning of the statute. In *Hill v. Humphreys* (c), Lord *Eldon* said, "that a person shall not split the demand which he has in the character of an attorney; and that the statute attaches upon the whole demand which he has in that character." In *Thwaites v. Mackerson* (d), it was held, that, if an attorney have demands in his professional capacity, some of which are taxable, and others not, he cannot recover for the items that are not taxable, without deliver-

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(a) 6 Term Rep. 645.

(b) 11 East, 285.

(c) 2 Bos. & Pul. 345.

(d) 1 Mood. & Malk. 199.

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ing a bill for them as required by the statute, or inserting them in the bill delivered for the taxable business; and in *Benton v. Garcia* (a), Mr. Justice *Heath* said, "that an attorney cannot split his demand, as it would be multiplying actions." Therefore, where an attorney brought an action against a client, and part of his demand was for money advanced to his client's use, and the remainder for business done, and no bill was delivered, he was not allowed to divide his demands at the trial, and recover for the money advanced.

Mr. Serjeant *Taddy*, and Mr. Serjeant *Jones*, in support of the rule.—It is clear that the first is not a taxable item, on the authority of *Crowder v. Davies*, where it was decided, after time taken by the Court of *Exchequer* to consider, that an attorney's bill for business in bankruptcy need not be delivered pursuant to the statute 2 *Geo. 2*, c. 23, s. 23, or taxed under the statute 6 *Geo. 4*, c. 16, before the commencement of the action. The statute 2 *Geo. 2*, applies only to cases where business has been actually done in the course or progress of a cause or suit. The items in question, therefore, are not fees, charges, or disbursements, at law or in equity, contemplated by the Legislature, as these words only embrace fees, charges, and disbursements in some proceeding taken by the attorney in Court, and cannot be taken to extend to advice given to a client upon a legal or equitable question, where the attorney is unconscious of any proceeding existing; and an individual would not be subject to the penalties of the statute in giving the advice contained in the items in the plaintiff's bill; for, in order to bring it within the meaning of the statute, some act of his must be proved to have been done in Court; and it is not sufficient to shew that some items in the bill refer merely to a

(a) 3 *Esp. Rep.* 152; *S. C.* 11 *East*, 286, n.

cause or suit, for a party cannot apply for an order for taxation unless some act or business has been done in Court; for the 23rd section of the statute directs an application to be made to a Judge of the Court in which the business contained in *such bill* shall have been transacted; and if no opposition could have been made to tax the plaintiff's bill, there being no transaction in Court, he was not bound to comply with the previous part of the clause by delivering his bill signed; the words *such bill*, in the latter part of the clause, referring to the bill before directed to be delivered and signed by the attorney. In *Mowbray v. Fleming*, the first item was, "to attendances with you, both by myself and clerk, on Mr. T., respecting a suit at law commenced against your brother, R. F., when, after consulting counsel, and after several attendances and letters, the business was adjusted to your satisfaction, 2*l*. 2*s*." Some of the Judges doubted whether the first item was to be considered as any thing more than an attendance by the defendant's desire, for the purpose of compromising the suit against his brother. Here, the attendances were after the service of a writ on the defendant, and afterwards advising him upon an action brought against him at the suit of *Mather*; but neither of those items had reference to any business done in Court, and the plaintiff might have attended for the sole purpose of advising the defendant to settle the action. In *Fenton v. Correa* (a), it was held, that searching at the judgment office, to ascertain whether satisfaction had been entered on the roll, and also whether issue had been entered and docketed in the action, were not taxable items within the 23rd section of the statute 2 Geo. 2; and in *Burton v. Chatterton*, Mr. Justice Best said (b)—"This case does not appear to me to fall either within the words or spirit of the act of Parliament; for, a party cannot properly be

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(a) 1 Ryan. & Mood. 262.

(b) 3 Barn. & Ald. 489.

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said to proceed, either at law or in equity, until something be done by him under the authority of a Court." The case of *Winter v. Payne* goes to the full extent of the rule as to the construction of the statute; but there the attorney not only took instructions to commence an action, but attended the swearing of the affidavit of debt, and paid for administering the oath. They were therefore taxable items; and in *Watt v. Collins*, Lord Chief Justice Best said: "It is necessary to be assured of business having been done in a cause, or that proceedings in Court have existed, in the conduct of which the defendant has received assistance from the plaintiff as an attorney." That case, however, cannot be considered as an authority, as it appears that the cause was ultimately referred to the Prothonotary, and the legal objection withdrawn.

But the plaintiff is at all events entitled to have a verdict entered for him for the 3*l*., as he did not pay it in his character of attorney in the conduct of a cause, neither did he advance it to the defendant for the immediate purpose of settling *Mather's* action. When the defendant received the money, he might apply it as he pleased; and it does not necessarily follow that he appropriated it to discharge the debt and costs in the action brought against him; and as it was not included in the plaintiff's bill, it was a distinct and separate transaction, and was not a taxable item within the authority of *Mowbray v. Fleming*. In *Prothero v. Thomas* (a), where an attorney had paid money in consequence of his undertaking to pay the debt and costs, it was held not to be a disbursement by him as an attorney within the meaning of the statute.

Lord Chief Justice TINDAL.—I thought at the trial, and still retain the same opinion, that the two last items in the plaintiff's bill were taxable charges, and therefore

(a) 6 Taunt. 196; S. C. 1 Marsh. 539.

that his demand fell within the terms and meaning of the statute 2 Geo. 2, c. 23, s. 23. It is always difficult in an extreme case, to say whether it falls within a previous construction which has been put on a statute; but, when we consider that this is a remedial act, it is far better to bring a case within its operation, than to leave it altogether unprovided for. The items in question were charges made by the plaintiff, an attorney, for attending the defendant in his character of attorney, and advising him in two suits: in the one he had been served with a writ after paying the amount of the debt; and in the other, the plaintiff advised him in an action that had been brought against him at the suit of one *Mather*. The last is clearly a charge for an attendance and advising as to a step to be taken in the progress of a suit; and the words of the statute are, "that no attorney or solicitor shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements, at law or in equity, until the expiration of one month or more after such attorney or solicitor respectively shall have delivered unto the party or parties to be charged therewith, a bill of such fees, charges, and disbursements, which bill shall be subscribed with the proper hand of such attorney or solicitor respectively." The question, then, is, whether the defendant, having process sued out, and a suit commenced against him, and having consulted with the plaintiff, an attorney and officer of the Court, as to the subject of the suit and the best mode of defence, and the plaintiff charged a fee for the advice given, it is not a fee or charge for business done in an action or suit, within the scope and meaning of the statute? In *Watt v. Collins*, a charge by an attorney for attending, by the desire of the defendant, two persons who had agreed to bail him, was held to be a taxable item within the statute, although the proposed bail were found not to be competent to justify. In *Winter v. Payne*, a charge for attending and taking instructions to commence

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an action, and for drawing and engrossing an affidavit of debt, and attending a party to get him sworn thereto, were held to be charges for business done in Court, although the affidavit was never filed, and no writ was ever taken out upon it; and the Court said, that the act of Parliament, being beneficial to the subject, ought to receive a liberal construction. Here, however, it appears by the first item, that the defendant had been served with a writ previously to the plaintiff's attendance and conference thereon. But there are several other cases bearing on the question, which have not been adverted to in the course of the argument, nor were they referred to at the trial. In *Sandom v. Bourn* (a), an attorney brought an action to recover a charge for preparing a warrant of attorney for the defendant, and Lord *Ellenborough* said—"The preparing of a warrant of attorney is *with a view* to business to be done in Court, and the expense comes under the head of 'fees at law.'" But a warrant of attorney is not an act in Court until it is duly filed; and in *Weld v. Crawford* (b), where one item of an attorney's bill was for drawing and preparing a warrant of attorney to confess a judgment, Lord Chief Justice *Abbott*, after referring to the former decisions upon the subject, acceded to an objection raised for the defendant, that that item rendered the whole of the bill taxable, although the instrument had not been executed. It therefore seems to me that the plaintiff has charged the defendant certain fees, the amount of which he has a right to question before the Prothonotary, who has a power to reduce them in case of an overcharge. This, then, being a remedial statute, although the items in question may not be strictly charges for business done in Court, yet, I think they fall within the operation of the act. With respect to the 3*l*., as it was proved to have been advanced by the plaintiff to the defendant for the express purpose of discharging the debt and costs

(a) 4 Camp. 68.

(b) 2 Stark. Rep. 538.

in the action brought against the latter by *Mather*, it is a disbursement in the conduct or progress of the suit, and falls also within the meaning of the statute.

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Mr. Justice PARK.—It is a well known and established rule of law, and which has not been disputed in this case, that, if there be one taxable item in an attorney's bill, it draws into its vortex all other items in the same bill, although they may not be taxable. That shews that the statute 2 *Geo. 2*, c. 23, has been held to be a remedial act. Speaking for myself, I feel no difficulty in this case, because I have frequently, at chambers, referred to the Prothonotary items similar to the present; and, I think it most important that a rule which has so long obtained and been acted upon, should not be relaxed. Has there, then, in this case been any business done in a cause? It appears by the first item, that a writ had been served on the defendant, and the plaintiff's charge is for attending him, conferring, and advising thereon. The second item was a charge for attending the defendant, and advising him on an action that had been brought against him at the suit of one *Mather*. That, therefore, was a proceeding in Court, and the advance of the 3*l*. by the plaintiff makes the case still stronger against him, as he lent it to the defendant to settle the debt and costs in that action. The plaintiff therefore not only gave his advice to the defendant, at the outset, but assisted him with money to settle the action. The case of *Watt v. Collins* appears to me to be equally as strong as the present, as there was no charge for business done in Court, and the bail were not even in a situation to justify. So, in *Sandom v. Bourn*, Lord *Ellenborough* held that a bill is taxable which contains a charge for preparing a warrant of attorney, which is certainly not a business done in Court; and that case has been continually acted upon since. It therefore appears to me that this rule must be discharged.

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Mr. Justice BOSANQUET.—I am of the same opinion, and think that the nonsuit was right. It is quite clear that the statute 2 Geo. 2, c. 23, ought not to receive a strict construction, as it is a remedial act and beneficial to the subject. It has therefore been held that one taxable item in an attorney's bill draws all the others after it, although they may not be of a taxable nature. The question then is, whether there is a taxable item in the plaintiff's bill. The last is for attending the defendant, and advising him in an action that had been brought against him at the suit of *Mather*. That appears to me to be a taxable item, and for which the plaintiff has made a charge accordingly. It is in the nature of a fee or charge for business done in Court, because it is a proceeding in an action or suit, which action is clearly a proceeding in the Court where it is pending. With respect to the 3*l*. lent by the plaintiff to the defendant, I think it cannot be separated from the residue of the plaintiff's demand, particularly, as it was proved that he advanced it to enable the defendant to arrange for the payment of the debt and costs in *Mather's* action; and, whether the plaintiff made the payment himself, or gave the defendant money to do so, it amounts to the same thing, and is a disbursement within the terms of the statute.

Mr. Justice ALDERSON.—I ought to feel considerable doubt, after the opinions which have just fallen from the Court; but my present impression, after the best consideration I have been able to give this case, is, that neither of the items in question is a taxable item, and therefore that the plaintiff ought not to have been nonsuited. I admit, that, if there be one taxable item in the bill, it draws all the others after it; but what is the definition of a taxable item? An item for which a charge is made, which it is competent to the Court to refer to their officer for taxation. Now, the 23rd section of the statute 2 Geo. 2, c.

23, provides, "that, upon application of the party chargeable by the bill, unto the Court, or to a Judge of the Court in which the business contained in such bill shall have been transacted, such Court or Judge may refer it to be taxed and settled by the proper officer of such Court, without any money being brought into Court for that purpose." The power to refer, therefore, is limited to the Court, or to a Judge of the Court; and I do not think an attorney's merely advising with his client is business done in Court. Here it does not appear that any business had been done in Court; and I admit that the 3*l*. advanced by the plaintiff cannot be separated from the rest of his demand. Still, however, I am of opinion that neither of these items was taxable, and that opinion appears to me to be strengthened by the case of *Burton v. Chatterton*, where a charge for preparing an affidavit of a petitioning creditor's debt, and bond to the Chancellor, in order to obtain a commission of bankruptcy, was held not to be a taxable item within the statute, as being a charge at law or in equity, as the affidavit had not been sworn, nor a commission issued; and Lord *Tenterden* said—"We ought to be quite satisfied, before we nonsuit a plaintiff upon this ground, that there was some authority to which these items could have been referred for taxation." That is the true principle, and although in *Sandom v. Bourn*, Lord *Ellenborough* held that a bill was taxable which contained a charge for the preparing of a warrant of attorney, *with a view* to business to be done in Court; yet, Mr. Justice *Bayley*, in *Burton v. Chatterton*, said—"The case of *Sandom v. Bourn* certainly does not range within the authorities referred to in argument. But that was only a decision at *Nisi Prius*, and whenever that question shall arise, it will be sufficient to give my opinion respecting it." In *Winter v. Payne*, the affidavit of debt was sworn *and paid for*, which distinguishes that case from *Burton v. Chatterton*. As, therefore, neither of the items in the plaintiff's bill in this case refers to business done

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in Court, I am of opinion that they are not taxable; but, as the rest of the Court think otherwise, my opinion avails nothing; and therefore, the rule for setting aside the non-suit must be—

Discharged.

Monday,
Jan. 24th.

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The Neapolitan government raised money upon certain *certificats de rente*, or bonds.

With each *certificat* or bond was delivered a document called a *bordereau*, annexed, to which were a series of *coupons*, or receipts for successive half-yearly payments of the *rentes* or dividends.

When the *coupons* attached to the *bordereau* were all made use of, the holder of the *certificat* and remaining *bordereau* was entitled to receive from the Neapolitan government, a new *bordereau* with a new set of *coupons*: both these instruments

referred to the *certificat*, and they were never sold in the London market without being accompanied by the *certificat*. The plaintiff, being possessed of certain of these *certificats* and *bordereaux*, deposited the latter with his broker for the purpose of his procuring from the Neapolitan government new *bordereaux*, retaining the *certificats* in his own hands. The broker, having procured the new *bordereaux* with *coupons*, fraudulently pledged them with the defendant. In *detinue* by the original owner, it was left to the Jury to say—*first*, whether the *bordereaux* and *coupons* (unaccompanied by the *certificats*) were negotiable securities, passing by delivery, in the same manner as bank-notes, Exchequer bills, and the like instruments—*secondly*, whether the defendant had exercised due caution in receiving them from the broker, without inquiring for the *certificats* to which they referred:—*Held*, that the direction was right; and the Jury having found a verdict for the plaintiff—The Court refused to disturb it.

THIS was an action of debt and *detinue*. The first count of the declaration was for money had and received by the defendant to the plaintiff's use; the second, on an account stated between them; the third, for interest; the fourth, for the detention by the defendant of certain instruments belonging to the plaintiff, called *bordereaux*, with certain instruments called *coupons* thereto annexed, purporting to belong to certain certificates or obligations of the administration of Naples, called Neapolitan bonds, or Neapolitan *certificats de rente*; and the fifth, for the detention by the defendant of certain instruments and documents belonging to the plaintiff. The defendant pleaded to the first three counts, *nil debet*; and to the two last, that he did not detain the instruments and documents in those counts mentioned; to the fourth, that the plaintiff did not deliver to the defendant the instruments and documents in that count mentioned; and to the fifth, that the plaintiff was not lawfully possessed, as of his own property, of the instruments and documents in that count mentioned: on all of which pleas issue was joined.

At the trial, before Lord Chief Justice *Tindal*, at *Guildhall*, at the Sittings after the last *Trinity* Term, the circumstances of the case were as follow:—The government stock or funds of the kingdom of the Two *Sicilies* are not, as in this country, composed of principal sums of money owing to the national creditors, and bearing an interest or annuity until paid off; but are personal annuities, in the nature of our Long Annuities, except as to the duration. The *Neapolitan* certificates of *rente*, or *Neapolitan* bonds, as they are termed in this country, are certificates under the hands of the administrators of the *rentes*, or perpetual annuities, certifying that the proprietor thereof is entitled to a certain annual *rente* or annuity in ducats, inscribed in the great book of the kingdom of the Two *Sicilies*, in the joint names of the administration, with power to the proprietor to have his own name inscribed in the great book in their stead, upon fulfilling certain conditions therein stated. With each certificate is delivered a series of sometimes six, and sometimes fourteen orders for payment of a succession of half yearly dividends, which are commonly called *coupons*, from being cut off when required from the border to which they are annexed or attached, which latter is commonly called the *bordereau*, and sometimes the *talon*. The following is a translated copy of a *certificat de rente*, the original being in the *French* language:—

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“ Administration of the *rentes* of the kingdom of the Two *Sicilies*. A. ducats 25. Certificate No. 4544 of ducats 25, at the rate of 4-40 livres. 110 of annual *rente* to commence from the 1st *January* 1818. Good for 25 ducats of *rente* inscribed in the great book of the kingdom of the Two *Sicilies*, in the joint names of *M. M. Jean Louis Falconnet, Jean Servillo, Charles Louis Roulet, J. Bte. Bourgingnon, Achille Meuricoffre, Charles Bonnet*; under the number of order of payment, 283.

“ To the bearer—

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"The proprietor will always have the power of converting the annuity of 25 ducats specified in this obligation, into inscriptions in the great book of this kingdom, in his own name, or in the name of his nominees, upon causing this document to be presented to the administration by some person known at *Naples*, together with the orders for interest not due, and the receipt for procuring new orders after the payment of those first issued, and complying with the mode of transfer in use at the direction of the great book of this kingdom. Made at *Naples*, the 17th *January*, 1818.

*"Falconnet & Co., Mewicoffre & Co.,
J. Bte. Bourgingnon."*

"N.B.—There have been delivered with this certificate, six orders for dividends, the last of which is payable the 1st *January*, 1821; as well as a receipt for obtaining six new orders for the succeeding dividends, No. 123.

"I, the undersigned, director of the great book, attest that this present certificate of twenty-five ducats of annual *rente*, numbered 4544, is part of an inscription in the great book of the kingdom of the Two *Sicilies*, D. 750, transferred No. 30, into the names above mentioned, and to the account No. 283. The above-mentioned *rente* cannot be transferred anew, but on the presentation of this certificate, in order that my signature may be cancelled.

"Naples, the 17th *January*, 1818.

"The Director of the Great Book.

"Registered, No. 4981.

"The Liquidator General."

The following is a translated copy of a *bordereau* and a *coupon*:—

"Bordereau of six *coupons* of *rentes* (annuities).

"A.—Belonging to the certificate No. 4544, of the administration at *Naples*.

"Receipt for six *coupons* of *rentes* belonging to the certificate 4544.

" In exchange for this receipt, there will be delivered to the bearer, after the expiration of the *coupons* up to the 1st *January*, 1826, hereto annexed, six new *coupons* of *rente* for the succeeding payments of the sum of twelve ducats, fifty grains, inscribed in the great book of the kingdom of the Two *Sicilies*, in the names of our administration.

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" *Naples*, the 1st *January*, 1823.

" *Meuricoffre*, ppr. *Ville & Co.*

" A. No. 1817,

" *Falconnet & Co.*

" E. No. 1987."

" *Coupon* of twelve ducats, fifty grains of *rente*, of the half year falling due the 1st *January*, 1826, belonging to the certificate No. 4544, of twenty-five ducats of annual *rente* inscribed in the name of our administration. This *coupon* will be paid at *Naples*, on the receipt of the bearer, after the realization (*recouvrement*) of the same half year of our cumulative.

" *Inscription*, No. 283.

" *Naples*, the 1st *January*, 1823.

A. No. 1817.

" For the administration,

" *Falconnet & Co.*"

" E. No. 11922.

When all the *coupons* are disannexed or cut off from the *bordereau*, it must be transmitted to *Naples*, to enable the holder or proprietor to get a new series of *coupons*; and to the new series of *coupons* delivered in exchange for the former *bordereau*, a new *bordereau* is attached, expressed in the same terms as the former; which new *bordereau* entitles the holder, when the *coupons* attached to it are exhausted, to claim in like manner as before a new series of *coupons* and *bordereau*, and so on in perpetuity.

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The plaintiff, in *September*, 1822, directed one *Watts*, his stock-broker, to purchase for him one hundred *Neapolitan* bonds; which he did, and delivered the certificates and the *bordereaux* and *coupons* belonging thereto to the plaintiff. In the beginning of the year 1824, the series of *coupons* being nearly exhausted, the plaintiff left the *bordereaux* with *Watts*, in order that he might obtain from *Naples* a new series of *coupons*; but he kept the certificates in his own possession. *Watts*, at that time, was a broker of the highest respectability, and the plaintiff had unbounded confidence in him; but in *September*, 1825, he absconded, and has never appeared to a commission of bankrupt which was issued against him in *October* following. The defendant had also employed *Watts* for several years to invest his money for him, and *Watts* allowed him *3l. per cent.* on his deposits, until an eligible investment could be found; and the defendant having deposited a large sum with him for investment, in *July*, 1824, he sent him, by way of security, the *bordereaux* and *coupons* which had been obtained from *Naples* for the plaintiff, whom he deceived by saying that they had not arrived. The plaintiff afterwards having ascertained that these securities were in the hands of the defendant, who refused to give them up after a formal demand made by the plaintiff, a bill in *Chancery* was filed for an injunction to restrain the defendant from negotiating or using the securities, but which was afterwards dissolved. The defendant in his answer stated, that the dividends and *coupons* of *Neapolitan* and other foreign securities were often sold at the *Stock Exchange* distinct from the bonds, such bonds not being necessary to identify them in the receipt of the dividends. The plaintiff then commenced the present action, by which he sought to recover from the defendant as well the *bordereaux* and the remaining *coupons*, as the dividends which had been paid on those *coupons* which had become due since the *bordereaux*

were deposited in the hands of the defendant by *Watts*; and he called several of the most respectable members of the *Stock Exchange* as witnesses, who proved that they never knew that the *bordereaux* and *coupons* were sold in the *English* market unless they were accompanied with the bonds or certificates; and several of them said, that they would not have taken the *bordereaux* and *coupons* alone, but would have required the certificates also.

His Lordship then left it the Jury to say—*first*, whether the *bordereaux* and *coupons* without the certificates passed in the *English* market from bearer to bearer, like money, bank-notes, *Exchequer* bills, or securities of a like nature; and—*secondly*, whether the defendant had used a reasonable degree of caution in taking the *bordereaux* and *coupons*, without requiring the certificates to which they referred? The Jury found that the *bordereaux* did not pass like money or bank-notes, or instruments of that description, and that the defendant had not acted with due caution in having taken the *bordereaux* from *Watts*, without requiring the certificates; and they accordingly returned a verdict for the plaintiff.

Mr. Serjeant *Taddy*, in the last term, obtained a rule nisi that this verdict might be set aside and a verdict entered for the defendant instead thereof, or a new trial had, on the grounds—*first*, that the question, whether the above securities passed from hand to hand, and were to be considered as securities for money, as bank-notes, or instruments of a like nature, was improperly left to the Jury, as it was a question of law, and depended on the nature of the instruments themselves, and which the Lord Chief Justice was competent to decide, and which he ought to have done after he had inspected the *bordereaux* and *coupons*; and as they were deliverable and payable to bearer, they passed from hand to hand without the certificates, and might be assimilated to *Prussian* bonds; and,

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in *Gorgier v. Mieville* (a), it was held, that the property in those instruments passed by delivery, as the property in bank-notes, *Exchequer* bills, or bills of exchange payable to *bearer*; and that, consequently, an agent in whose hands such a bond was placed for a special purpose, might confer a good title by pledging it to a person who did not know that the party pledging was not the real owner. *Secondly*, as to the question whether the defendant had used due diligence, or acted with proper caution in taking the *bordereaux* and *coupons* from *Watts*, without requiring the certificates, the verdict was not warranted by the evidence, because the testimony of the brokers who were called for the plaintiff, applied only to cases of a sale, and not to a pledge or deposit, by way of security. Besides, the opinion of the brokers was immaterial, for the question was, how these securities were treated by the *Neapolitan* government? and it appeared that they exchanged one *bordereau* for another when the *coupons* were exhausted, without requiring the production of the certificates; and if the defendant had obtained the certificates, they would only have enabled him to procure his name to be enrolled in the great book of the kingdom of the Two *Sicilies*; and, except for that purpose, the *bordereaux* and *coupons* passed from hand to hand, and gave a perfect and complete title to the bearer or holder.

Mr. Serjeant *Wilde* and Mr. Serjeant *Adams* now shewed cause.—As both the *bordereaux* and *coupons*, upon the face of them, refer expressly to the certificates to which they belong, and it was proved that the *bordereaux* were never sold without the certificates, the plaintiff is entitled to retain his verdict. The defendant was guilty of negligence in taking the one without the other: he at all events ought to have inquired for the certificates; when he would have ascertained that *Watts* was not the proprietor of the *bordereaux*:

(a) 3 Barn. & Cress. 45; S. C. 6 Dow. & Ry. 641.

and as he had no right to them, the defendant could not acquire a better title than *Watts* himself had; and in point of fact he gave no consideration for the securities in question, as *Watts* was his debtor long previously to the delivery, and continued to be so until he absconded; and the instruments were delivered to him, not by way of sale, or in payment, but as a security for a debt already due. Although it has been said, that these documents are negotiable in point of law, as *Exchequer* bills, or instruments of a like nature, yet they were securities given by a foreign state, and were therefore not current in this country, but could only be made negotiable by the practice of merchants, or by general usage. The question as to their being negotiable, was purely a question of fact for the Jury; and they have come to a right conclusion from the evidence before them. The defendant was certainly not a holder of these instruments for value, for he gave no valid consideration for them to *Watts*, who was guilty of the grossest possible fraud, by depositing them with the defendant by way of security for a sum then in his hands, and which the defendant had directed him to invest on some good and available security. In the late case of *De la Chamette v. The Bank of England* (a), where a Bank of *England* note, which had been stolen in this country, and a year afterwards was remitted by a foreign merchant to his correspondent here, to whom he was indebted in a sum exceeding the amount of the note, and the latter demanded payment, but the Bank refused to pay, on the ground that the note had been stolen, and at the time when the correspondent was informed of this, he had not made the foreign merchant any advance on the credit of the note; in an action of trover for the note by such correspondent, it was held that it was incumbent on him to shew, on proof of the note having been stolen, that the foreign merchant had given full value for it. Here, the situation of neither of the parties was

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(a) 9 Barn. & Cress. 203.

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changed by the delivery of the *bordereaux* and *coupons* by *Watts* to the defendant; and he should at least have made some inquiries respecting them at the time he received them: and it might be assumed that he knew the course of dealing in the market, particularly when he seeks to retain them as against a *bona fide* owner. The cases of *Gill v. Cubitt* (a), *Snow v. Peacock* (b), and *Down v. Halling* (c), have established the principle, that a person who takes instruments of this nature, should exercise a reasonable degree of caution, and endeavour to ascertain that the party from whom he took them had a good title to them. Due diligence is a part of the *bona fides* of the transaction; and although it has been said, that the securities were delivered to the defendant by way of pledge only, yet he cannot acquire a title to them against a person who was the original holder, and who was entitled to the *bordereaux* in question, as soon as they were transmitted to *Watts* from *Naples*. In *Gorgier v. Mieville*, the bonds were payable to every person who should for the time being be the holder; besides which, it was proved that instruments of that description were sold in the market, and passed from hand to hand, like *Exchequer* bills, according to the state of the market; but here, as it was proved that the *bordereaux* and *coupons* were never sold without the certificates to which they referred, the case bears a nearer resemblance to that of *Glyn v. Baker* (d), where it was decided, that the property in *India* bonds does not pass by delivery, as it was not shewn that they were negotiable instruments, or that any other person could sue upon them than the obligees: and in the course of the argument, Mr. Justice *Le Blanc* asked (e)—“ If the defendant's counsel mean to build any argument upon the negotiability in fact of these instruments, ought not the fact itself to have been

(a) 3 Barn. & Cress. 466; S. C.
5 Dowl. & Ryl. 324.

(b) 3 Bing. 406; S. C. 11 B.
Moore, 286.

(c) 4 Barn. & Cress. 330; S. C.
6 Dowl. & Ryl. 455.

(d) 13 East, 509.

(e) Id. 513.

stated in the case?" And here the question as to the negotiability of the instruments was expressly left to the Jury, and their verdict is conclusive.

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Mr. Serjeant *Taddy*, Mr. Serjeant *Bompas*, and Mr. Serjeant *Heath*, in support of the rule.—At the time the defendant received the securities in question from *Watts* his broker, he was in the highest possible reputation, and the defendant had no reason to suspect his solvency or respectability; and as the defendant had an existing debt due to him from *Watts*, it was a sufficient consideration for their being deposited with the defendant. No new consideration was necessary at the time of such deposit, for a promise to pay may be inferred; and it is quite clear that there was a complete change of the securities, in consideration of a previous advance by the defendant to *Watts*. No fraud can be attributable to the defendant, either legally or morally, and whether he had given a valid consideration was a question of fact for the Jury, and as it was not left to them; he is entitled to a new trial. In *De la Chaumette v. The Bank of England*, the Court directed a new trial, to give the plaintiff an opportunity of proving that the merchant abroad gave full value for the note. But the main question in this case is, whether the securities which were delivered by *Watts* to the defendant, are negotiable without the certificates to which the *bordereaux* and *coupons* refer. The certificates only give the holders of the *bordereaux* an option to become proprietors of *Neapolitan* stock, by converting the annuity into inscriptions in the great book of the kingdom of the Two *Sicilies*. But the *bordereaux* and *coupons* are available for all purposes of money, and they give the bearer a complete title to receive the half yearly dividends; and if the certificates were lost, the dividends would still be payable on the production of the *coupons*; and when they were exhausted, new *bordereaux* might be obtained, without the

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production of the certificates to which the old *bordereaux* referred. Securities for payment of money are divisible into several different classes. *First*, those which are upon the face of them payable to bearer, which the *coupons* clearly are, without even the production of the *bordereaux*; and those instruments also state upon the face of them that the new *coupons* shall be delivered to the bearer on the receipt of the *bordereaux*. They are therefore wholly distinct from the certificates, and are at all events negotiable, when they are delivered by way of a security only, and not as an absolute sale. *Secondly*, instruments which are not payable to bearer, may be either domestic or foreign, as bills of exchange, which in many instances bear an extrinsic character on the face of them, as in *Grant v. Vaughan* (a), where the defendant gave his ship's husband a draft upon his, the defendant's, broker, payable to Ship *Fortune*, or bearer; and Mr. Justice *Wilmot* said (b)—“It would be of infinite inconvenience, and would introduce the utmost confusion, if it were to be established that the bearer of a bill or note made payable to bearer, could not maintain his action upon it. It must be negotiable every where, if it is negotiable at all.” And Mr. Justice *Yates* said—“It was not within the province of the Jury, to determine upon the negotiability of this note; it was a question of law, not of fact, whether such a bill or note was or was not negotiable.” *Thirdly*, *India* bonds have been held not to be negotiable, because no action could be brought upon them but by the original obligee, or in his name. But, bonds given by persons of rank are saleable, and pass from hand to hand, and the holder may sue in the name of the obligee. In *Gorgier v. Mieville*, where the bond was payable to the holder, no evidence was given as to the law of *Prussia* with respect to it; and Lord Chief Justice *Abbott* said (c)—“This instrument, in its

(a) 3 Burr. 1516. (b) Ibid. 1528. (c) 3 Barn. & Cress. 46.

form, is an acknowledgment by the King of *Prussia*, that the sum mentioned in the bond is due to every person who shall for the time being be the holder of it; and the principal and interest is payable in a certain mode, and at certain times mentioned in the bond. It is, therefore, in its nature precisely analogous to a bank-note payable to bearer, or to a bill of exchange indorsed in blank. Being an instrument, therefore, of the same description, it must be subject to the same rule of law, that whoever is the holder of it, has power to give title to any person honestly acquiring it." In this case, although several brokers stated that the *bordereaux* and *coupons* were not sold, unless they were accompanied by the certificates; yet the former were negotiable by force of the instruments themselves, and the words upon the face of them, as they were not only deliverable and payable to bearer, but the word *appartenant* (belonging to) merely has reference to the number of the certificate, which is not necessary either for the receipt of the dividends, or a change of the *bordereaux* when the *coupons* are exhausted. Although these latter instruments might not in strictness be considered as money, yet they might be transferred by delivery; and it is for the Court to say, whether they are negotiable or not. At all events, the law and custom at *Naples* with respect to the securities in question should have been proved; for a Court of justice in this country is not competent to take notice of foreign laws, unless such proof be given. *Freemoult v. Dedire* (a). In *Wookey v. Pole* (b), it was held that an *Exchequer* bill, the blank in which was not filled up, passed by delivery like a bank-note, or a bill of exchange indorsed in blank; and although Mr. Justice *Bayley* differed from the rest of the Court, yet Mr. Justice *Best* said (c): "The delivery of goods by a person who is not the owner (except in a manner author-

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(a) 1 Peere Wms. 431.

(b) 4 Barn. & Ald. 1.

(c) Ibid. 6.

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ized by the owner) does not transfer the right to such goods; but it has been long settled, that the right to money is inseparable from the possession of it. I conceive that the representative of money, which is made transferable by delivery only, must be subject to the same rules as the money which it represents;" and in *Miller v. Race*, Lord *Manfield* put bank-notes on the same footing as money, on account of their currency, and observed (a)—"It has been quaintly said, that the reason why money cannot be followed is, because it has no ear-mark. But this is not true: the true reason is, upon account of the currency of it: it cannot be recovered after it has passed in currency." If, then, the *bordereaux* and *coupons* were negotiable instruments, the holders might pledge them; and as the defendant received them *bond fide*, he has a right to retain them as against the plaintiff; for, in *Collins v. Martin*, Lord Chief Justice *Eyre* said (b)—"For the purpose of rendering bills of exchange negotiable, the right of property in them passes with the bills. Every holder with the bills takes the property, and his title is stamped upon the bills themselves. The property and the possession are inseparable. This was necessary to make them negotiable; and in this respect they differ essentially from goods, of which the property and possession may be in different persons. The property passing with the possession, it is admitted that a banker who receives indorsed bills from his customers, to be got in when due, and carried to his account, may discount or sell them. Why may he not pledge them? Either is a breach of the confidence reposed in him. He may sell, because the property has been entrusted to him; and he may pledge for the same reason; for he who has the property has a disposing power, and the law has not limited it to be used in any particular manner." In *Lickbarrow v. Mason*, Mr. Justice *Ashhurst* said (c)

(a) 1 Burr. 457.

(b) 1 Bos. & Pul. 651.

(c) 2 Term Rep. 70.

—“We may lay it down as a broad general principle, that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss, must sustain it.” And, in *Truettell v. Barandon*, Mr. Justice Dallas said (a): “There can be no doubt, that, if a person deposit a bill of exchange, which is indorsed in blank, (and therefore a negotiable instrument), with a banker for the purpose of being received when due, if pledged by the banker for his own debt, it cannot be followed by the owner into the hands of the pledgee; for, the indorsement passes the property in the bill.” *Lastly*, although the Jury have found that the defendant did not exercise a due degree of caution, as he did not inquire for the certificates when he received the *bordereaux* from *Watts*, as he might then have discovered who the true owner was; yet the certificates would not have informed him that the plaintiff was the holder. And this case is altogether distinguishable from *Gill v. Cubitt* and *Snow v. Peacock*, as there the parties took the notes from strangers, and under suspicious circumstances, and without making the necessary inquiries which a prudent man would reasonably be induced to make; whilst here, the defendant took the securities from his own broker, who was at that time considered to be a man of the highest respectability and credit; and as they were deposited with the defendant as a security for a previous advance, it ought not to have been left to the Jury to say whether he had acted with due or proper caution, particularly, as the instruments were made deliverable and payable to the bearer, by which they may be assimilated to bills of exchange indorsed in blank, which pass by delivery: the plaintiff therefore cannot be entitled to retain his verdict.

Lord Chief Justice TINDAL.—In this case, I left two questions to the consideration of the Jury; and their find-

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(a) 1 B. Moore, 546; S. C. 8 Taunt. 103.

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ing in the negative in either is decisive, if they were properly submitted to them. Their decision on the first question appears to me to be sufficient to support the verdict for the plaintiff. I shall, therefore, confine my attention to that alone, although I entertain very little, if any, doubt as to the propriety of their finding on the second. The first question to which I desired them to call their attention was, whether the documents or instruments produced before them had acquired, from practice, or the course of dealing or usage pursued in the city of *London*, the character of negotiable securities for money, such as bank-notes, bills of exchange, dividend-warrants, *Exchequer* bills, or other instruments of a like nature, which form part of the currency of this country. That was the most material question. It is a general rule of law, that, if a person trusts or confides his property to an agent, who misapplies it, or disposes of it without the authority of his principal, he may, in case he be enabled to identify it, recover it back from the party holding it, in whatever hands it may be found. There is, however, an exception to this rule, in favour of the ordinary currency of the country, which rests on the ground, that the rule would be highly inconvenient if it had the effect of preventing intercourse between merchants, or frustrating mercantile transactions. It was, therefore, a proper question to be left to the Jury, to say what the character of these *coupons* and *border-eaux* was; because, if they were merely in the nature of securities, as a bond, or mortgage-deed, or an instrument of a like nature, the plaintiff was entitled to recover. But, if they had acquired a different character, and fell within the exception to the general rule, the defendant would be entitled to retain them. It has, however, been objected for the defendant, that, on looking at the face of the documents, the Judge ought to have told the Jury that they were negotiable instruments. But, if I had taken upon myself to direct them one way or the other, I see nothing on the face of these instruments to lead me to infer that they were

negotiable. *First*,—Let us consider the nature of the *coupons*. They are receipts for consecutive half-yearly payments of the *rentes* of the *Neapolitan* government, and are in force from the year in which they are dated, for six or seven years successively. But, because these *coupons* or receipts run on for fourteen half-years successively from the date of the *bordereaux*, they are not necessarily negotiable instruments, or to be considered as current money. I should rather infer the contrary, because those which become due at remote periods decrease in value when compared with those which are payable within the current year; the whole requires to be equalized by an allowance in the nature of discount; and it is impossible to say that the *coupons* can have a known rate of discount, like bills of exchange, which, by the custom of merchants, are given and taken in payment without any reference to discount as between the original parties. Then, the *bordereau* is a mere undertaking on the part of the Government of *Naples* to give a new list of *coupons*, with a new *bordereau* attached, when the six *coupons* on the old *bordereau* are used or exhausted. Now, this cannot be assimilated to a negotiable instrument for the payment of money, which passes from one man to another. If, therefore, it was incumbent on me to decide whether these documents were negotiable or not, there is nothing on the face of them to lead me to the conclusion that they are to be considered as money, or negotiable instruments. But the answer to the objection is, that they are not *English* instruments, or recognised by the Judges of this country in Courts of law; but they are brought to our notice for the first time as *Neapolitan* securities, and founded on the law of *Naples*. We are not bound to give credence to them, or even to form an opinion upon them, unless we are furnished with evidence as to the law of the country from whence they emanated. *English* Judges have only taken upon themselves to decide on the nature of documents or instruments recognised by the law of this coun-

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try, as bills of exchange, which pass current by the custom of merchants. So, *Exchequer* bills and bank-notes have been made transferable by the Legislature, as every Judge in an *English* Court of Justice is bound to know. But it has been said, that, in *Gorgier v. Mieville* (the case of the *Prussian* bonds), no evidence of the foreign law was required or given; but it was there proved that bonds of that description were sold in the market, and passed from hand to hand daily, like *Exchequer* bills, at a variable price according to the state of the market; so that evidence as to the law of *Prussia* was rendered unnecessary. But here there was no evidence to shew that these instruments were transferable or negotiable, either by the law of *Naples* or of this country. The question is, not as to what is the usage in the country from whence the instruments come, but what is the usage in the country where they are passed or transferred. That question I left in terms to the Jury, *viz.* whether these *coupons* and *bordereaux* passed from hand to hand like bills of exchange and instruments of that nature. That was a point which it was incumbent on the defendant to have made out, as the general rule is, that a plaintiff is entitled to pursue his property, in case he is able to identify it, in whatever hands it may be found. But the plaintiff called several witnesses, who proved, that, at the time these instruments were disposed of by *Watts* to the defendant, they were not regarded as money, or in the nature of money, or even as negotiable instruments. The Jury found expressly that they were not, and thereby negatived the exception to the general rule, which must prevail, *viz.* that the plaintiff is entitled to recover his own property, it being found in the hands of the defendant, a stranger, who had acquired it from an agent who had no authority to dispose of it.

Mr. Justice PARK.—It is unnecessary for me to express

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any opinion on that branch of the argument on which much time has been consumed, *vis.* whether the defendant gave a valuable consideration for the instruments in question. It cannot, or need not be imputed to him, that he acted morally wrong; but the case turns on the single question, whether he exercised a due degree of caution in taking them, or whether he ought not to have made some further inquiry. When the motion for setting aside the verdict was made, I doubted whether the law or the fact was questioned; but, whether the defendant used due caution or not when he took the securities from his broker, was purely a question for the Jury. That rule has been acted upon from *Miller v. Race* to the recent cases of *Snow v. Peacock*, and *Down v. Halling*: and if we do not now give effect to a well-known and established rule of law, we shall overturn all the previous decisions on the subject. In *Miller v. Race*, Lord Mansfield said (a)—“Here, an innkeeper took the note, *bond fide*, in his business from a person who made the appearance of a gentleman. Here is no pretence or suspicion of collusion with the robber; for this matter was strictly inquired and examined into at the trial. Indeed, if there had been any collusion, or any circumstances of unfair dealing, the case had been much otherwise. If it had been a note for 1,000*l.* it might have been suspicious; but this was a small note, for 21*l.* 10*s.* only, and money given in exchange for it.” In *Peacock v. Rhodes*, his Lordship said (b)—“The question of *mala fides* was for the consideration of the Jury. The circumstances, that the buyer and also the drawers were strangers to the plaintiff, and that he took the bill for goods on which he had a profit, were grounds of suspicion very fit for their consideration.” In *Snow v. Peacock*, I am reported to have said (c), “that the reasoning of Lord Kenyon, in *Solomons v. The Bank of Eng-*

(a) 1 Burr. 458.

(b) 2 Doug. 636.

(c) 11 B. Moore, 301.

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land (a), is very different from the opinion expressed by him in *Lawson v. Weston* (b)." And in *Gill v. Cubitt*, the authority of that case was impugned and in effect overruled by Lord Chief Justice *Abbott* and Mr. Justice *Holroyd*, the latter of whom said (c)—"I cannot agree with the doctrine laid down in *Lawson v. Weston*. The question, whether a bill or note has been taken *bond fide*, involves in it the question whether it has been taken with due caution. It is a question of fact for the Jury, under all the circumstances of the case, whether a bill has been taken *bond fide* or not; and whether due and reasonable caution has been used by the person taking it." And here, that question was in terms left to the Jury; and I think that it was most properly left. The cases referred to in the course of the argument differ only in species, each depends upon its own peculiar circumstances. In *Gill v. Cubitt*, the bill was taken to the office of the discount broker between nine and ten in the morning; and in *Snow v. Peacock* a bank-note for 500*l.* was changed by country bankers in *Lincolnshire*, for their own notes; and the question left to the Jury in both these cases was, whether the parties took the bill and note under circumstances which ought to have excited the suspicion of a prudent and careful man, or whether due caution had been observed by them. Here, there was sufficient evidence to raise the question as to whether the defendant had acted with a proper degree of caution in taking the *bordereaux* from his broker without requiring the certificates to which they referred. Several experienced brokers proved that they knew no instance where the *coupons* and *bordereaux* had been sold without the certificates. But, without their testimony, a person cannot fail to observe that the production of the whole of the documents was necessary, as each of the instruments on the face of

(a) 13 East, 135, n.

(b) 4 Esp. Rep. 57.

(c) 3 Barn. & Cress. 477.

it refers to the other; and upon looking at the certificate which accompanies the *bordereau*, and which is signed by the Liquidator General of the *Neapolitan* finances, it is stated that the *rente* cannot be transferred anew but on the presentation of the certificate, in order that his signature might be cancelled. That was of itself sufficient to raise a suspicion or invite an inquiry by the defendant. In the case of foreign triplicate bills of exchange, first and second not paid, would any man pay the third without ascertaining what had become of the other two? On the whole, therefore, I think that both questions were properly left to the Jury, and that they have come to a right conclusion. Although Mr. Justice *Bayley* differed from the rest of the Court in *Wookey v. Pole* (a), yet the question has been since more fully considered; and the principle now established, that a party taking a bank-note of value, or other negotiable instrument, from a stranger, is bound to exercise a proper degree of caution, and make some inquiry as to the person offering it, and how he became possessed of it, appears to me to be founded on reason and good sense.

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Mr. Justice BOSANQUET.—I am of opinion that there is no sufficient ground for objecting to the direction of my Lord Chief Justice, or to the verdict which the Jury have found. Many questions have been raised in the course of the argument, upon which it is not necessary to give any opinion. The two material points are—*first*, whether the instruments in question were negotiable, and passed from hand to hand unaccompanied by the certificates;—and, *secondly*, whether the defendant received them under such circumstances as to entitle him to hold or retain them as against the plaintiff, from whom they had been obtained by a gross and manifest fraud. It has been contended, that, by

(a) 4 Barn. & Ald. 14.

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the nature of the instruments, and from what appears on the face of them, they are transferable, as the *bordereau* states that six new *coupons* of *rente* shall be delivered to the bearer after the *coupons* annexed to the *bordereau* shall have become due, and the *coupon* is payable at *Naples* against the bearer's receipt; and therefore that the nature of the instruments should have been determined by my Lord Chief Justice, and not have been left to the Jury. But, *prima facie*, these instruments are not transferable to bearer by the law of *England*, as they are not within the custom of merchants, or made transferable by any legislative enactment. They are foreign securities; the defendant therefore was bound to shew how they were treated in the country from which they were sent, and that they were, either by the law of that country, or by the custom of this, transferable, as negotiable instruments which pass by delivery. But the evidence is all the other way, for several brokers proved, that, on a sale, all the instruments were transferred together, *viz.* the *bordereau*, with the *coupons* annexed, and the certificate also. They were therefore only transferable *sub modo* in the *English* market. The case of *Gorgier v. Mieville* has been mainly relied on for the defendant, where it was held that *Prussian* bonds were transferable or negotiable instruments. But by these bonds the King of *Prussia* bound himself and his successors to every person who should for the time being be the holder of the bond, for the payment of the principal and interest, in the manner therein pointed out. But that was not deemed sufficient of itself, for it was further proved, that bonds of that description were sold in the market, and passed from hand to hand daily, like *Exchequer* bills; and that circumstance was relied on by Lord Chief Justice *Abbott*, at the conclusion of his judgment. But, independently of the question, whether these instruments were negotiable or not, and even admitting that they passed by delivery from hand to hand, another most important question was left to the Jury, and

which was purely for their consideration, and which they alone were competent to determine—namely, whether, if they should consider these instruments to be negotiable, the defendant had exercised that degree of prudence and caution, when he received them from his broker, as would entitle him to hold them against a party from whom they had been obtained by fraud. Bank-notes payable to bearer, or bills of exchange indorsed in blank, unquestionably pass by delivery. But if they are circulated by a stranger in a distant part of the country, or are of a large amount, it has been deemed important to inquire whether the party taking them had exercised due caution; as in *Snow v. Saddler* (a), where the defendant took a 30*l.* Bank of *England* note from a stranger at *Doncaster Races*. In *De la Chaumette v. The Bank of England* (b), it appeared at the trial, that Bank of *England* notes to the amount of 500*l.* were commonly bought and sold at *Paris* by money-changers; but the Court directed a new trial, for the purpose of ascertaining whether the party who took the note gave full value for it. In *Solomons v. The Bank of England*, it appeared that a bank-note for 500*l.* was not a note of ordinary currency in *Holland*, where it was passed; and Lord *Kenyon* thought “that the house at *Middleburgh* ought to have given some account how they came by the note; notes of this amount not being ordinarily current there.” But it has been observed, that in *Gorgier v. Miesville*, Lord Chief Justice *Abbott* said (c)—“That a *Prussian* bond is an instrument of the same description as a bank-note payable to bearer, or a bill of exchange indorsed in blank, and must therefore be subject to the same rule of law, that whoever is the holder of it, has power to give title to any person honestly acquiring it;” and he thought at the trial that the bond might be pledged to any person who did not know that the person pledging

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(a) 11 B. Moore, 506; S. C. 3
Bing. 610.

(b) 9 Barn. & Cress. 210.

(c) 3 Barn. & Cress. 46.

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it was not the real owner. Prior to the case of *Gill v. Cubitt*, the attention of the Courts had not been so much drawn to the point, that, although an instrument may be in itself negotiable, still it does not pass, if there be a want of proper caution or diligence on the part of the person who receives or takes it. Here, the first material point for the Jury to consider was, whether the instruments in question were received by the defendant under such circumstances as will entitle him to hold them as against the plaintiff. The defendant is a merchant, and took the instruments from his broker, who carried on an extensive business as such. It must therefore be assumed, that the defendant knew how these instruments were dealt with in the money market, and that it was the usual course to transfer all the instruments together; and the attention of the defendant should have been called to the certificate by the *bordereau* and *coupons*, as they both referred to it. It was therefore a fair question for the Jury to consider, whether, from the course in which these instruments were passed in the money market, the defendant had exercised the reasonable caution of a prudent man in taking the *bordereaux* and *coupons* without requiring the certificates. It has been observed, that where a party empowers another to commit a fraud, he must be himself responsible; but that does not apply to this case, for the plaintiff retained the certificates in his own hands as a check upon his broker. The direction, therefore, of my Lord Chief Justice was not only proper, but the Jury came to a right conclusion.

Mr. Justice ALDERSON.—I am of the same opinion. In *Miller v. Race*, Lord Mansfield said (a)—“The true reason why money cannot be followed is, upon account of the currency of it; it cannot be recovered after it has passed in

(a) 1 Burr. 457.

currency." That is the true principle; and, applying it to this case, the question is, whether the *bordereaux* and *coupons* were taken in the course of currency. As the *bordereau* is a foreign security, it was incumbent on the defendant to have made inquiry, or endeavoured to obtain some information as to its currency; and several respectable brokers, who were called by the plaintiff, proved, that the course was not to take the *bordereau* unless it were accompanied with the certificate. I therefore think that evidence was properly received on this point, and also that the Jury came to a right conclusion upon the second question, as to whether the defendant used due diligence in taking the securities. It is quite clear, that if he had asked the broker for the certificates, the fraud would have been discovered, but he omitted to do so; and it was therefore properly left to the Jury to say, whether he had acted with proper caution in taking the *bordereau* without the certificate. As each *bordereau* referred to the number of the certificate, it was natural for the defendant to have asked for the certificate, which the original holder or proprietor of the *bordereau* must have received, and which ought to have passed with it in case of a sale or transfer to a third person. The Jury, who were perfectly conversant with mercantile instruments, were of that opinion; and although it has been said, that the defendant trusted his broker, and was not acquainted with the nature of the documents, yet, if he chose to go into the market, and purchase them without making any inquiry, he is certainly culpable; and I cannot say that he has used due diligence to discharge himself from the consequences of his neglect. Both questions, therefore, were properly left to the Jury, and, as their verdict is conclusive, this rule must be—

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Discharged.

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Tuesday,
Jan. 25th.

A Sheriff's officer seized goods under a writ of *feri facias*, part of which were afterwards packed up in two parcels, the one to satisfy the amount of the levy, the other to be sold to pay the Sheriff's poundage and incidental expenses of the levy. The execution was afterwards abandoned, but the goods which were to be appropriated to the payment of the poundage were sent to the Sheriff's officer, who afterwards received the amount of the poundage, and forwarded the parcel to the execution-creditor. The party against whom the execution was sued out, had previously committed an act of bankruptcy:—*Held*, that there was a sufficient conversion by the Sheriff to render him liable in trover to the assignee of the bankrupt, as the officer not only exercised a control over the bankrupt's goods, but assented to some of them being packed up, and which were sent to him to secure the payment of the poundage.

CARLISLE, Assignee of LEONARD, a Bankrupt, v. GARLAND, Esquire.

THIS was an action of trover for goods seized under an execution by the defendant, as Sheriff of the county of *Dorset*. At the trial, at the *Summer Assizes at Dorchester*, in 1826, the Jury returned a special verdict to the following effect:—

“ That *George Valentine Leonard*, being a trader within the intent and meaning of the statutes made and then in force concerning bankrupts, committed an act of bankruptcy on the 15th *October*, 1824, on which a commission was afterwards issued against him—that, on the 15th *December*, in the same year, a writ of *feri facias* was issued out of the Court of *King's Bench*, tested the last day of *Michaelmas* Term preceding, returnable on *Monday* next after eight days of *St. Hilary* then next, and directed to the Sheriff of *Dorset*, commanding him to levy of the goods and chattels of the said *George Valentine Leonard*, a debt of 604*l.* which *Joshua Payne* had recovered against him in the Court of *King's Bench*, as also 65*s.* for his damages, &c.; which writ was indorsed to levy 306*l.* 1*s.* 6*d.*, besides Sheriff's fees, poundage, officer's fees, and all other incidental expenses—that, on the 16th of the same month, the writ was delivered to Mr. *William Parr*, at that time undersheriff to the defendant, who was then Sheriff of *Dorset*, by *John Williams*, an agent of the said *Joshua Payne*, together with the following letter from Messrs. *Green & Ashhurst*, his attorneys:—

Sambrook Court, Basinghall St. 15th Dec. 1824.

“ ‘ Sir,—The bearer, Mr. *Williams*, will deliver a writ of *feri facias* to you, which we have issued against the

bankrupt's goods, but assented to some of them being packed up, and which were sent to him to secure the payment of the poundage.

goods of Mr. *G. V. Leonard*, and upon which you will be pleased to grant a warrant to an officer living near to *Lyme*; and we authorize you and the officer to take Mr. *Williams's* directions on the subject of this execution, and to withdraw from possession, if he shall think fit to request you so to do. We are &c.

Green & Ashhurst.'

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"That, on the 17th of *December*, the defendant issued his warrant, directed to *William Restarick*, his bailiff, reciting the writ, and commanding him to levy of the goods and chattels of the said *G. V. Leonard* as required by the said writ, that the Sheriff might have the money, as by the same writ he was commanded—that the warrant was delivered by *Williams*, the agent of *Joshua Payne*, to *Restarick*, together with the following letter from *Parr*, as under-sheriff, to *Restarick*:—

" ' *Poole*, 16 *December*, 1824.

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" ' Sir,—Inclosed is a warrant to levy on the defendant's property, which I send you by Mr. *Williams*, whose directions you will take in the execution of the warrant; and if he requests you to withdraw the execution, you will do so, on his giving you a written authority. *W. Parr.'*

"That *Restarick*, on the 17th *December*, entered *Leonard's* house at *Lyme*, in the county of *Dorset*, and there seized and took divers goods in the declaration mentioned, which were the goods of *Leonard* at the time of his bankruptcy, of the value of 450*l.*, under and by virtue of the same writ, putting *Robert Gascoigne*, his assistant, in possession, and leaving with him the warrant—that *Gascoigne* kept possession of the same till the 24th of the same month—that, whilst *Gascoigne* was so in possession as the assistant of *Restarick*, divers goods, parcel of the goods in

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the declaration mentioned, of the value of 445*l.*, which were the goods of *Leonard* at the time of his bankruptcy, were made up into thirteen packages, which *Restarick* understood were packed for the purpose of satisfying the levy, in pursuance of an arrangement made between *Williams* and *Leonard*, eight of them to pay the debt due from *Leonard* to *Payne*, and the remaining five of them to be sold by *Payne* for the Sheriff's poundage, officer's fees, and other expenses, which *Williams*, as such agent, should have incurred or might incur in and about the levy, the surplus balance to be remitted to *Leonard*—that, after such arrangement had been so made between them, on the 24th *December*, *Williams* delivered to *Restarick*, as agent for *Payne*, two letters, one dated the 23rd *December*, signed by *Leonard*, and directed to *Restarick*, as follows:—

“ ‘ I request and empower you to take goods instead of cash, to the amount of the levy in the above cause.’ ”

“ The other dated *Lyme*, 24th *December*, 1824, and signed by *Williams*, as follows:—

“ ‘ I hereby authorize and request you to quit possession, the plaintiff having been satisfied the whole debt and costs in this action.’ ”

“ ‘ That the execution was afterwards, on that day, wholly abandoned, and *Gascoigne* and *Restarick* quitted the premises of *Leonard*, leaving all the goods thereon—that, two hours after, *Williams* came to *Restarick* at a neighbouring inn to settle with him for the Sheriff's poundage, and *Restarick's* expenses for inventory, holding possession, levying, and other expenses, which were then adjusted, except 5*l.*, as to which, *Williams* and *Restarick* agreed that *Williams* should cause goods to the amount of 5*l.* to be packed up and sent to *Bridport* to *Restarick*, to be deposited with and kept by him till the 5*l.* should be

remitted to him—that a quantity of goods of the value of 5*l.*, being the residue of the goods mentioned in the declaration, was accordingly fetched from the shop of the bankrupt by a shopman of the bankrupt, and was, on the 26th *December*, received at *Bridport* by the *Lyme* carrier—that the 5*l.* was, about two months after, paid to *Restarick*, who forwarded the package of goods about the same time that the money was paid, by the van, to *Payne* in *London*—that *Restarick*, at the time he received the goods, knew that they were part of the goods which had been so seized as aforesaid—that the said thirteen packages of goods were, after the execution was abandoned as aforesaid, on the same day, sent by *Williams*, as such agent as aforesaid, from the house of *Leonard* to the *Cob* at *Lyme*, each of them being marked with the letters *J. P.*, being the initials of *Joshua Payne's* name, and thence shipped for *London*, addressed to *Smith's* wharf, and directed by *Williams* to be sent to No. 34, *Old Change*, for *Joshua Payne*—that they were landed, on their arrival in *London*, at *Smith's* wharf—that, on the 8th *January*, 1825, a commission of bankrupt issued against *Leonard*, under which he was, on the 14th of the same month, declared a bankrupt—that, on the 29th of the same month, an assignment of the estate and effects of the bankrupt was made to the plaintiff by the commissioners under the said commission—that, in the beginning of *February*, 1825, the plaintiff's agent asked the wharfinger at *Smith's* wharf to deliver the said packages of goods, which he refused, until it was ascertained in a Court of law to whom they belonged—that, on the 15th *June*, 1825, at *Poole*, in *Dorsetshire*, the plaintiff demanded the goods mentioned in the declaration of the defendant, who referred him to Mr. *Parr*, his under-sheriff—that the plaintiff, soon after, seeing the defendant and Mr. *Parr* together at *Poole*, asked Mr. *Parr*, in the presence of the defendant, whether it was his (*Parr's*) intention to comply with the terms of the same demand or not? To which Mr. *Parr* answered, 'certainly not.'

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"But whether or not upon the whole matter by the jurors found, the defendant is guilty of the premises, they are altogether ignorant, and therefore pray the advice of the Court, &c."

The case now came on for argument, when

Mr. Serjeant *Bompas*, for the plaintiff, submitted, that the question raised by the special verdict had been expressly decided by this Court, first, in the case of *Lazarus v. Waithman* (a), and finally determined, after time taken for consideration, in *Price v. Helyar* (b), where it was ruled, that, if a Sheriff take goods of a trader in execution after an act of bankruptcy committed by him, the Sheriff is liable to his assignees in trover, although he had no previous notice of the act of bankruptcy, and although the commission did not issue until nearly two months after the levy, and though the goods seized had not been removed from the premises, but were only detained there until the amount directed to be levied was paid to the Sheriff by the party against whom the execution was sued out. The same point was determined by the Court of *Exchequer*, in *Potter v. Starkie* (c), and at *Nisi Prius*, in *Wyatt v. Blades* (d), where Lord *Ellenborough* thought that the removal of goods taken in execution by the Sheriff, after a secret act of bankruptcy, was a sufficient conversion to maintain trover against the Sheriff, although he had afterwards notice not to sell them. The only question then is, whether there was any conversion of the bankrupt's goods by the Sheriff. The facts found by the Jury, and set forth in the special verdict, are sufficient to shew that there was an actual conversion. A

(a) 5 J. B. Moore, 313.

(c) 4 Mau. & Selw. 260, n.

(b) 1 Moore & Payne, 541; S. C. .

(d) 3 Camp. 396.

4 Bing. 597.

writ of *feri facias* was sued out, directed to the defendant, as sheriff of *Dorset*. The writ was delivered to the under-sheriff by an agent of the execution-creditor. The under-sheriff, by his letter of the 16th *December*, 1824, made the agent of the execution-creditor his agent also, as he ordered the bailiff to follow the directions of such agent in the execution of the warrant issued by the defendant to levy on the goods of *Leonard*, the bankrupt. The bailiff seized the goods accordingly; and whilst they were in the possession of his assistant, part of them were packed up, some to satisfy the levy, and the remainder to pay the Sheriff's poundage, officer's fees, and other incidental expenses. That, therefore, is equivalent to an absolute removal, as there was an express appropriation by the Sheriff through the act of his officer. But, after that arrangement had been made, the agent of the execution-creditor delivered to the bailiff a letter signed by the bankrupt, requesting the bailiff to take goods instead of cash, to the amount of the levy; and on the following day the execution was abandoned, although there had been a previous conversion by packing up part of the goods to satisfy the expenses of the levy. In *Hurst v. Gwynne* (a), it was held that trover was maintainable by the assignees of a bankrupt against a person who had purchased goods from him in the usual course of his trade after a secret act of bankruptcy, although the goods were purchased on sale and return, and the assignees afterwards demanded payment from the defendant as upon a sale of the goods; Lord *Ellenborough* being of opinion that the action was maintainable, since the very act of taking the goods from one who had no right to dispose of them, was in itself a conversion.

The learned Serjeant was proceeding with his argument, when the Court called on—

Mr. Serjeant *Peake*, to distinguish this from the cases cited.

(a) 2 Stark. Rep. 306.

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This cause was first tried in 1825, when a verdict was found for the plaintiff. A new trial was afterwards directed, on the ground that the facts appearing upon the report of the learned Judge were not sufficient to enable the Court to come to a satisfactory conclusion. Upon the second trial, the Jury found this special verdict. It was at first the intention of the defendant to bring the case of *Cooper v. Chitty* (a) before the Court, but they thought that there was no conversion by the Sheriff after the commission was sued out. Although the main question in this case has been decided in *Price v. Helyar*, which was determined since the special verdict was found, and it would be indecorous to impugn so recent a decision, yet it ought not to be carried further than the facts of that case will warrant: there, however, there was abundant evidence of a conversion, for the Sheriff's officer declared that he would have proceeded to a sale, if the amount of the levy had not been paid by the party against whom the execution was sued out. In *Wyatt v. Blades* there was a conversion by the officer, as the goods seized were removed to a broker's, and remained there at the time the cause came on for trial, although the Sheriff had previous notice that they belonged to the assignees. Here, however, a small part of the goods merely was packed up, and no part of them was removed before the execution was withdrawn. The officer was authorized to quit possession by the agent of the execution-creditor, and the defendant is not responsible for the acts of such agent after the officer had left the premises, and the execution was abandoned. Taking, therefore, all the circumstances found by the Jury together, it is quite clear that the defendant, as Sheriff, was justified in making the seizure; and there was no subsequent conversion by him or his officer, as the latter acted under the direction of the agent of the execution-creditor; and it does not appear that the de-

(a) 1 Burr. 20.

fendant ever instructed his officer to levy or sell any of the bankrupt's goods for the purpose of satisfying the poundage or other expenses incidental to the levy.

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Mr. Serjeant *Bompas*, in reply.—There can be no doubt but that the Sheriff was guilty of a conversion of the bankrupt's goods, for they were not only packed up for the purpose of satisfying the levy, but some of them were to be sold to pay the poundage, officer's fees, and other incidental expenses; and the packages were made up while the bailiff's assistant continued in possession. By the letter of the 24th *December*, the bankrupt requested the officer to take goods instead of cash to the amount of the levy, and the object of the officer was to secure the Sheriff his poundage, the amount of which was afterwards adjusted and eventually paid to the officer.

Lord Chief Justice TINDAL.—It appears to me, that the statement of facts on this special verdict shews a sufficient conversion by the defendant to authorize the plaintiff to maintain an action of trover, if such action be sustainable by law against the Sheriff. I shall confine myself to the simple question, as to whether there has been a conversion by the defendant as Sheriff, because the abstract point of law has been so recently determined by this Court in *Price v. Helyar*, and by the Court of *Exchequer* in *Potter v. Starkie*. If, therefore, the defendant is anxious, or shall be advised, to have the point again discussed, it will be better to leave him to a higher tribunal, as the question is on the record. Now, what are the facts found by the Jury as to the conversion? The day before the seizure the under-sheriff wrote a letter to the defendant's bailiff, inclosing a warrant to levy on *Leonard's* property, which warrant the under-sheriff stated he had sent the bailiff by *Williams*, who was the agent of *Payne* the execution-creditor, and that the bailiff was to take *Williams's* directions in

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the execution of the warrant. The bailiff entered on the following day, and seized *Leonard's* goods, putting *Gascoigne*, an assistant of the bailiff, in possession, and leaving the warrant with him. Whilst *Gascoigne* was so in possession as such assistant, thirteen packages of *Leonard's* goods were made up with the assent of *Gascoigne*, who was then in the legal possession, for the purpose, as the bailiff understood, of satisfying the levy, in pursuance of an arrangement made between *Williams*, the agent of the execution-creditor, and *Leonard*, against whom the execution was sued out. But what became of the goods after they were packed up? A distinction was made between the packages; for one parcel, consisting of eight packages, was made up to pay the debt due from the bankrupt to the execution-creditor, and the remaining five were to be sold for the Sheriff's poundage and other incidental expenses incurred in making the levy, which were afterwards adjusted, and 5*l.* was actually paid to the defendant's officer. As, therefore, the Sheriff received the benefit of some of the packages in discharge of his poundage, and his officer was instrumental and assenting to the goods being packed up, he adopted the acts of the agent of the execution-creditor; and I therefore think that there was a sufficient conversion by the defendant as Sheriff to render him liable to the plaintiff in this action.

Mr. Justice PARK.—I am of the same opinion. There was sufficient evidence adduced at the trial to shew that the defendant was guilty of a conversion. I abstain from giving any opinion on the question of law, but I concurred with the Court in the decisions of *Lazarus v. Waithman* and *Price v. Helyar*. In the latter case, those of *Cooper v. Chitty* and *Smith v. Milles (a)*, were fully considered; and nothing I have since heard has induced

(a) 1 Term Rep. 481.

me to doubt the authority of *Price v. Helyar*, or to dispute the principle there laid down.

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Mr. Justice BOSANQUET.—I am of the same opinion, and feel myself bound, by the two late decisions in this Court, to declare, that the defendant is responsible to the plaintiff in this form of action; and I entertain no doubt whatever, but that these cases were rightly decided. The question, however, is raised on the record, and the defendant may avail himself of it, if he should be so advised. With respect to the conversion, the Sheriff was in fact a party to all that was done. His officer was his agent, and he not only exercised a control over the goods, but assented to some of them being packed up for the purpose of securing payment of the poundage. That appears to me to amount to a sufficient conversion.

Mr. Justice ALDERSON.—It appears that thirteen packages of the bankrupt's goods were divided into two parcels, the one consisting of eight packages, the other of five, and that the latter were to be sold for the purpose of paying the Sheriff's poundage and other expenses incurred in making the levy. The Sheriff involved himself in all the acts of the agent to the execution-creditor, who clearly converted the goods; and the defendant's officer assented to his acts, and afterwards received a sum for poundage and other expenses, according to an arrangement made between the agent of the execution-creditor and the bankrupt.

Judgment for the plaintiff.

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*Tuesday,
Jan. 25th.*

To an action of trespass for an assault, the defendants pleaded that they were overseers of the poor, and that a select vestry of the parish was duly assembled and holden in a certain school-room within the parish, and that the defendants, as overseers, were present; that the plaintiff unlawfully entered the room, and the defendants expelled him;—it was proved that one of the five members who constituted the select vestry, had not been summoned, or received any previous notice of the meeting:—*Held*, that the plea was not proved, as the meeting was not a legally constituted vestry, so as to support the allegation, that the select vestry was duly assembled.

DOBSON v. FUSSEY and ROBINSON.

THIS was an action of trespass, for assaulting the plaintiff, and turning him out of a school-room.

The defendants pleaded—*First*, the general issue—*Secondly*, that, before the committing the supposed trespasses, to wit, on &c., at &c., the inhabitants of the parish of *Sproatley*, then in vestry assembled, did duly and according to the form of the statute in such case made and provided, establish a select vestry for the concerns of the poor of the said parish, and to that end did then and there duly nominate and elect in the same vestry such and so many substantial householders and occupiers within the said parish, not exceeding the number of twenty, nor less than five, as were in such vestry thought fit to be members of the said select vestry, to wit, *Thomas Dibbs, Edward Barber, Robert Fussey, George Caley, and John Williamson*; that, afterwards, and before the committing the supposed trespasses, to wit, on &c., at &c., the said persons so nominated and elected as aforesaid, were duly appointed by writing, according to the said act, under the hand and seal of one *Christopher Sykes*, clerk, he the said *Christopher Sykes* then and there being one of his Majesty's Justices of the Peace in and for the county of *York*;—that the defendants, before and at the time when &c., were overseers of the poor of the said parish of *Sproatley*, and that afterwards, and before the time when &c., to wit, on &c., a select vestry of the said parish was duly assembled and holden in a certain convenient place within the said parish, to wit, in a certain school-room within the said parish, touching the care and management of the concerns of the poor of the said parish, according to the said act, at which select vestry the defendants, as overseers of the poor of the said parish, were present; that, just before the time when &c., and whilst the said select vestry was

duly holden and sitting in the said school-room on parochial business as aforesaid, to wit, on &c., the plaintiff unlawfully entered and came into the said school-room, and then and there made a great noise and disturbance therein, and stayed and remained therein making such noise, without the leave or license, and against the will of the said select vestry so assembled as aforesaid, and thereby then and there greatly disturbed and disquieted the defendants and the other persons then and there composing the said select vestry as aforesaid; and thereupon the defendants, being such overseers, and two of the select vestry so assembled as aforesaid, then and there requested the plaintiff to cease from making his said noise and disturbance, and to go and depart from and out of the said school-room, which the plaintiff then and there wholly refused to do; whereupon the defendants, to prevent such interruption as aforesaid, and to force and compel the plaintiff to quit and leave the said school-room, at the said time when &c., gently laid their hands upon the plaintiff, in order to remove and did attempt to remove the plaintiff from and out of the said school-room; and thereupon the plaintiff then and there forcibly and violently resisted the defendants, and then and there unlawfully attempted to stay and remain in the said school-room; and it then and there became and was necessary to use force and violence for the purpose of removing the plaintiff from and out of the said school-room; and thereupon the defendants did then and there seize and lay hold of the plaintiff by the collar of his coat, and pulled and dragged about the plaintiff, and gave and struck the plaintiff the blows and strokes in the declaration mentioned, and forced, pushed, pulled, dragged, and drove the plaintiff from and out of the said school-room in the said school-house or building, and necessarily and unavoidably gave the plaintiff the other blows and strokes in the declaration mentioned, as it was

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lawful for them to do for the cause aforesaid, doing no unnecessary damage or injury to the plaintiff on that occasion.

Thirdly, that the defendants and divers other persons composing part of the said select vestry of the said parish, before and at the said time when &c., were lawfully possessed of a certain school-room, part and parcel of the said school-room or building in the declaration mentioned; and being so possessed thereof, the plaintiff, just before the time when &c., to wit, on &c., was unlawfully in the said school-room, and with force and arms making a great noise and disturbance there, and at the said time when &c. staid and continued there, making such noise and disturbance, without the leave or license and against the will of the defendants and divers other persons composing part of the said select vestry as aforesaid, and then and there greatly disturbed and disquieted the defendants and the said other persons in the peaceable and quiet possession and enjoyment of the said school-room; and thereupon the defendants then and there requested the plaintiff to cease making his said noise and disturbance, and to go and depart from and out of the said school-room, which the plaintiff then and there wholly refused to do; whereupon the defendants, in defence of the possession of the said school-room, and to force and compel the plaintiff to quit and leave the said school-room, at the same time when &c. in the said declaration mentioned, gently laid hands upon the plaintiff, &c. &c.

The plaintiff added a *similiter* to the plea of the general issue, and replied *de injuriâ* to the second and third, on which issue was joined.

At the trial, before Lord Chief Justice *Tindal*, at the last Assizes at *York*, it appeared that the defendants were the overseers of the poor of the parish of *Sproatley*, and that they, with the vestry-men named in the second plea,

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with the exception of *Thomas Dibbs*, were assembled at a meeting in the parish school-room, on the evening of *Saturday*, the *22nd May*, 1830, for the purpose of one of the out-going overseers paying over moneys, then in his hands, to the succeeding overseers. That the plaintiff, not being a select vestry-man, came into the room with two other persons, when he was turned out by the defendants. The clerk to the select vestry was called as a witness, who stated, that he had not summoned *Dibbs*, or given him any notice to attend at the meeting, although he had given notice to the other four persons named in the plea. It further appeared, that the usual days of meeting were on *Wednesdays*.

Under these circumstances, his Lordship thought that the defendants had not made out or proved the allegation in the second plea, that a select vestry of the parish was *duly assembled*, as *Dibbs* had received no notice of the meeting, which was a special meeting, and held for a particular purpose, and not convened on one of the general or usual days. The Jury accordingly found a verdict for the plaintiff, damages one shilling, leave being reserved to the defendants to move to set it aside and enter a nonsuit, or that a new trial might be had, in case the Court should be of opinion that either of the special pleas could be supported by the evidence adduced at the trial.

Mr. Serjeant *Jones*, in the last term, obtained a rule *nisi* accordingly. Against which—

Mr. Serjeant *Wilde* was now about to shew cause; when the Court called on—

Mr. Serjeant *Jones* to support his rule.—The first section of the statute 59 *Geo. 3*, c. 12, by which select vestries were first constituted, and are now regulated, enacts,

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that any three substantial householders or occupiers within a parish, having been first appointed by a magistrate, shall be a *quorum*, and constitute a select vestry for the care and management of the concerns of the poor; and as the defendants proved that four of the select vestry-men named in the second plea had received notice to attend the meeting in question, it was sufficient to shew that the vestry was duly assembled, particularly as against the plaintiff, who was a wrong-doer and an intruder, he not being a member of the vestry. The members who attended at the meeting acted as vestry-men. The meeting cannot be assimilated to a meeting convened for the election of a corporate officer, in which case it is necessary to give notice to all the members of the corporate body; because, here, the meeting was held for the sole purpose of one overseer paying over moneys in his hands to his successors in office; and, although the 4th section of the statute 59 *Geo. 3*, provides, that the churchwardens and overseers of the poor must cause ten days' notice to be publicly given, in the usual manner, of every vestry to be holden for the purpose of establishing any select vestry, or of nominating and electing the members, and of every vestry to be holden for the purpose of receiving the report of the select vestry; yet such notice cannot be required where a meeting is convened for a trivial purpose, neither is it necessary to summon or give all the members notice to attend such a meeting. Where, therefore, a notice is necessary, the statute has prescribed it; and as three vestry-men form a *quorum* when lawfully assembled, it is not necessary that five should have been summoned or have had previous notice of the meeting. If the officer, whose duty it is to summon the members, should die shortly after a meeting, and it could not be shewn that the members who attended had been summoned, it would not invalidate the meeting, provided three members were present, and acted

as vestry-men. But if the defendants, under their first special plea, were bound to shew that the vestry was duly assembled, in order to support that allegation; yet they adduced sufficient evidence to support the last plea, as it does not refer to the foregoing plea, and merely alleges that the defendants and divers other persons composing part of the select vestry were lawfully possessed of the school-room, and not that the vestry was duly assembled in that room. In order to constitute a select vestry, it is sufficient if a certain number of the body of the vestry-men are present; and it is not necessary to consider the precise nature of the meeting, or that they were duly assembled; if they were present and acted as vestry-men, it is sufficient; and it is quite clear that the defendants, and the four other vestry-men who were present at the meeting, were acting in their character of vestry-men at the time of the intrusion and interruption by the plaintiff.

Lord Chief Justice TINDAL.—The question on the first special plea is, whether, from the evidence given at the trial, the defendants made out the allegation that there was a select vestry duly assembled. The introduction of select vestries is of recent date, as they were first established by the statute 59 *Geo. 3*, c. 12, the 1st section of which enacts “that it shall be lawful for the inhabitants of any parish in vestry assembled, and they are thereby empowered, to establish a select vestry for the concerns of the poor of such parish; and to that end, to nominate and elect, in the same or in any subsequent vestry, or any adjournment thereof respectively, such and so many substantial householders or occupiers within such parish, not exceeding the number of twenty, nor less than five, as shall in any such vestry be thought fit to be members of the select vestry; and the rector, vicar, or other minister of the parish, and in his absence the curate thereof (such curate being resident in and charged to the poor's rates of such parish),

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and the churchwardens and overseers of the poor for the time being, together with the inhabitants who shall be nominated and elected as aforesaid, (such inhabitants being first thereto appointed by writing under the hand and seal of one of his Majesty's Justices of the Peace, which appointment he is thereby authorized and required to make), shall be and constitute a select vestry for the care and management of the concerns of the poor of such parish; and any three of them (two of whom shall neither be churchwardens nor overseers of the poor,) shall be a *quorum*; and every such select vestry shall continue and be empowered to act from the time of the appointment thereof until fourteen days after the next annual appointment of overseers of the poor of the parish shall take place, and may be from year to year, and in every future year, renewed in the manner thereinbefore directed; and every such select vestry *shall meet* once in every fourteen days, and oftener if it shall be found necessary, in the parish church, or in some other convenient place within the parish; and every such select vestry is thereby empowered and required to examine into the state and condition of the poor of the parish, and to inquire into and determine upon the proper objects of relief, and the nature and amount of the relief to be given." The question then is, what is to bring the members of the select vestry together? In order to ascertain this, we should look at the regulations of general or parish vestries. Now, the mode of collecting vestry-men, or bringing them together at a general vestry, is regulated by the statute 58 Geo. 3, c. 69, the 1st section of which enacts, "that no vestry or meeting of the inhabitants in vestry, of or for any parish, shall be holden, until public notice shall have been given of such vestry, and of the place and hour of holding the same, and the special purpose thereof, three days at the least before the day to be appointed for holding such vestry, by the publication of such notice in the parish church or chapel, on some

Sunday, during or immediately after divine service, and by affixing the same, fairly written or printed, on the principal door of such church or chapel." Although no precise mode is there pointed out as to the assembling of the vestry-men, and the regulations of general vestries may not of necessity be applicable to select vestries; yet, as the one bears an analogy to the other, it affords a strong reason for assuming that some formal mode must be pursued to bring select vestry-men legally together. Here, if five of the members composing the select vestry had fixed to meet on a particular day, it might perhaps have been sufficient without further notice. So, if they had met and adjourned to a given day, it might have dispensed with a notice for them to meet on the adjournment-day. But the meeting was called for a special purpose, and on an unusual day; and we have been called upon to say that the meeting was legally convened, although one of the five vestry-men named in the plea had received no notice that it would take place. But such a decision would lead to great mischief and inconvenience; for, as the statute enacts that any three shall be a *quorum*, they might meet to the exclusion of the remaining seventeen, and adopt regulations which the majority would not have assented to or acquiesced in. By analogy to the rules which prevail in summoning the members of a corporation, we cannot say that the meeting in question was a legally constituted select vestry, or that such vestry was duly assembled. But it has been said, that the third plea does not allude to the vestry so assembled; but it refers, without any qualification, to the said select vestry in the second plea mentioned, and virtually incorporates it, as it commences by stating that the defendants and divers other persons, composing part of the said select vestry, before and *at the said time when &c.*, were lawfully possessed of the school-room in the declaration mentioned. If the defendants did not shew that they had an exclusive right to the room, they were out of Court; for unless the nature of the meeting entitled them to ex-

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clude the plaintiff, there is nothing to shew that he was a wrongful intruder. I am therefore of opinion, that neither of the pleas was made out by the proof given at the trial, and consequently that this rule must be discharged.

Mr. Justice PARK.—On looking at the first special plea, I entertain no doubt whatever; for the defendants there alleged that a select vestry of the parish was *duly assembled*, and it appears that one of the five vestry-men named in the plea had no notice of the meeting. Besides, the meeting was not called on the usual day. That, in my opinion, makes the case still stronger against the defendants. If they selected an unusual day of meeting for a special purpose, it is impossible to say that they were duly assembled, unless notice of the meeting had been given to all the five members named in the plea. To hold otherwise, would be highly dangerous, as it might tend to great mischief; for, if three individuals, who might form a *quorum*, agreed to meet on a given day without giving any notice to the five or the twenty vestry-men who might constitute the vestry when duly assembled, it would be a great hardship that those latter individuals should be bound by the acts of the three. As to the last special plea, I fully concur with my Lord Chief Justice, as it refers to and in fact incorporates the allegations contained in the second. I therefore think that the verdict for the plaintiff ought not to be disturbed.

Mr. Justice BOSANQUET.—I am of the same opinion. The question on the first special plea is, whether the allegation, that a select vestry of the parish was duly assembled, was made out by the defendants at the trial. It appears that the meeting was not held on the regular or usual, but on a particular day, and for a special purpose. The defendants, therefore, should have proved a summons or notice to the five persons named in the plea, to attend the meeting, without which they could not have been legally

or duly assembled as a select vestry. The form of the notice is another question, but it is sufficient to say that some notice was necessary; and it is admitted that one of the five members, who is alleged to have constituted the select vestry, received no notice whatever. With respect to the last special plea, as it refers at the commencement *to the said select vestry*, it must be taken to mean the vestry as described in the first special plea, and to incorporate the one with the other, for the words "at the said time when" &c., must of necessity be taken to refer to the vestry alleged in the former plea to be duly assembled. Unless the defendants and other members present were acting in the character of vestry-men legally assembled, they were not authorized in turning the plaintiff out of the room. We are not bound to look at the particular purpose for which they met, because all we have to consider is, whether there was a select vestry duly or legally assembled at the time of the plaintiff's expulsion.

Mr. Justice ALDERSON.—I am of the same opinion. The defendants have precluded themselves by the allegation in their first special plea, as they did not prove that the select vestry was duly assembled; and, in order to justify their turning the plaintiff out of the room as stated in the third plea, they should have shewn that the vestry was legally and duly constituted. The room was a parish school-room, into which the plaintiff might have had as much right to enter as the defendants; and unless they shewed that all the five members named in the second plea had been either summoned or had had some notice to attend, they failed to prove that the meeting was duly assembled. Besides, it was called for a special purpose, and not on the usual day of meeting; and it might lead to great inconvenience if three of the members, who would constitute a *quorum*, might form resolutions behind the back of the majority, who, if they had been present, or had had any previous notice of the meeting, might have attended for

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the purpose of opposing such resolutions. This rule, therefore, must be—

Discharged.

Wednesday,
Jan. 26th.

GODDARD v. HARRIS, Clerk.

By the statute 9 Geo. 4, c. 31, s. 23, it is enacted, that if any person shall arrest any clergyman upon any civil process, while he shall be performing divine service, he shall be guilty of a misdemeanor, and, being convicted thereof, shall suffer such punishment, by fine and imprisonment, as the Court shall award. Where, therefore, the defendant, a clergyman, was arrested on *Christmas-day*, whilst he was officiating in a chapel, and he afterwards gave a bail-bond, the Court ordered the writ and subsequent proceedings to be set aside; but as neither the plaintiff nor his attorney ordered the arrest to be made on *Christmas-day*, the rule for setting aside the proceedings was made absolute without costs.

THE defendant, a clergyman, was arrested by a Sheriff's officer, under a *capias* sued out against him at the instance of the plaintiff, when the defendant was going to the communion table to officiate on *Christmas-day* last, in *Baker Street Chapel*.

Mr. Serjeant *Peake*, on a former day in this term, obtained a rule calling on the plaintiff to shew cause why the writ, and all subsequent proceedings taken thereon, should not be set aside, and the bail-bond given by the defendant to the Sheriff be delivered up to be cancelled, and why the plaintiff should not pay all the costs incurred thereon, and also the costs of this application. The learned Serjeant produced an affidavit of the defendant, which stated that he was the officiating minister at *Baker Street Chapel, Portman Square*, and that, on *Christmas-day* last, as he was proceeding to the communion table, for the purpose of officiating, he was arrested by a Sheriff's officer on a writ sued out against him at the suit of the plaintiff. By the statute 9 Geo. 4, c. 31, s. 23 (a), it is enacted, "that if any person shall arrest any clergyman upon any civil process, while he shall be performing divine service, or shall, with the knowledge of such person, be going to perform the same, or returning from the performance thereof, every such offender shall be guilty of a misdemeanor, and, being convicted thereof, shall suffer such punishment, by fine and imprisonment, or by both, as the Court shall award."

(a) An act for consolidating and amending the statutes in *England* relative to offences against the person.

Mr. Serjeant *Wilde* now shewed cause, on affidavits of the plaintiff and his attorney, which stated that the plaintiff did not order or direct the defendant to be arrested on *Christmas-day*, and that the attorney gave the officer the writ on the 20th *December*, but did not instruct him to arrest the defendant on the 25th, or while he was within the chapel, but that he only told the officer that the defendant had the cure of the chapel, and that he might be seen going there frequently. The learned Serjeant submitted, that as neither the plaintiff nor his attorney had sanctioned the arrest on *Christmas-day*, the defendant was not entitled to make this application to the Court; his remedy was against the Sheriff or his officer, who were liable to the penalty or imprisonment imposed by the statute. At all events, the Court will not impose on the plaintiff the payment of the costs incurred subsequently to the arrest, as it was made without his knowledge or direction.

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Mr. Serjeant *Peake*, in support of his rule.—The arresting a clergyman in a place of worship, which should be held sacred, was a most outrageous and indecent proceeding, and falls expressly within the provisions of the statute, which makes it an indictable offence to arrest a clergyman either going to or returning from the performance of divine service.

Lord Chief Justice TINDAL.—This rule must be made absolute, and the only question is, whether the defendant is entitled to the full extent of his application.—The statute 9 *Geo.* 4, c. 31, s. 23, makes an arrest of a clergyman while he is performing divine service, such an abuse of the process of the Courts, that they may interpose summarily, and set aside the proceedings. The plaintiff and his attorney are so far parties as to be responsible for the consequences of the arrest; but as they have sworn that they did not authorize the arrest within the chapel, or on *Christ-*

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mas-day, I am of opinion that the rule should be made absolute without costs, particularly as the defendant has his remedy against the Sheriff or the officer who made the arrest.

Mr. Justice PARK.—I think that the plaintiff or his attorney ought to pay the costs, especially as the latter told the officer who arrested the defendant, that he had the cure of the chapel, and that he might be seen going there frequently; and if he had been arrested on going to perform divine service, he would be within the protection of the statute.

Mr. Justice BOSANQUET.—I think, with my Lord Chief Justice, that this rule should be made absolute without costs. The arrest of the defendant in the chapel is an indictable offence, and punishable by fine or imprisonment. Although the plaintiff is answerable for the acts of his attorney, yet the latter has sworn that he did not instruct the officer to arrest the defendant within the chapel, or on *Christmas-day*.

Mr. Justice ALDERSON.—I concur with my Lord Chief Justice and my Brother *Bosanquet*, and think that the rule should be made absolute without costs, because it does not appear that the plaintiff or his attorney authorized the illegal act of the officer in making the arrest on the day or at the place in which it was made.

Rule absolute, without costs.

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PRICE v. SEVERNE.

THIS was an action of trespass for an assault and false imprisonment. The first count of the declaration stated, that the defendant made an assault upon the plaintiff, and put and placed handcuffs or fastenings upon his hands and arms, and imprisoned him, and kept and detained him in prison without any reasonable or probable cause whatsoever, for the space of twenty-four hours. There were also counts for assaulting and imprisoning the plaintiff, and for a common assault. Plea—Not guilty.

At the trial, before Mr. Justice *Gaselee*, at the last Assizes at *Northampton*, it appeared that the plaintiff, a man in a humble station of life, and out of employ, had an aunt, a lady of fortune, residing at the defendant's house in *Northamptonshire*; and that the defendant, in 1829, was Sheriff of that county. That, in *May*, 1830, the plaintiff, with his wife and three children, left *London* for *Northamptonshire*, and called at the defendant's house, and that he requested to see his relation, as his family were in great need of pecuniary assistance. That the defendant saw the plaintiff, when, being importunate in his demands, he was requested to leave the premises. This he did, but returned on the following day, and renewed his importunities, when he was again desired to leave the house; but, having refused to do so, the defendant directed a constable to take him into custody, which he did, and at first put a handcuff on his right arm, which was shortly afterwards removed; but the plaintiff was taken to a neighbouring inn, where he remained in custody during the night. On the following morning he was taken to the defendant's house, when he said he must have some money to take himself and his wife and family to town. The defendant said, that he would make inquiries about it; he then left the plaintiff, and returned in a

The plaintiff, a person in a humble station of life, had a relation, a lady of fortune, residing at the defendant's house. The plaintiff being importunate in his demands for relief, and refusing to leave the premises, the defendant ordered a constable to take him into custody, which he did, and the plaintiff remained in custody one night at an inn. On the following morning he was brought before the defendant, who offered him two sovereigns, which the plaintiff accepted. The defendant also gave him money to pay the hire of a horse, and refreshment. In an action of trespass for false imprisonment, the Jury having found a verdict for the plaintiff with 100*l.* damages, the Court considered them to be excessive, and directed a new trial.

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few minutes with two sovereigns, which he told the plaintiff he might take, or that he might go before a magistrate. The plaintiff consented to take the money, but said, at the same time, that he must have something for the keep of a horse he had hired to bring his wife and family to the defendant's house on the first day of their application; when the defendant gave him half a crown, and ordered him some refreshment, of which he partook, and shortly afterwards left the defendant's house. It did not appear that the defendant had ordered the constable to handcuff the plaintiff, nor that he was aware that he had done so when the plaintiff accepted the two sovereigns. Under these circumstances, the learned Judge told the Jury, that, as the defendant had not pleaded accord and satisfaction, the money he gave the plaintiff could only be taken in reduction of damages; and that, as the defendant was not justified in giving the plaintiff in charge of a constable, the plaintiff was entitled to a verdict. And, after summing up the whole of the evidence, it was left to the Jury to say what damages they thought the plaintiff was fairly entitled to. They, after a short deliberation, returned a verdict for the plaintiff, damages 100*l*.

Mr. Serjeant *Goulburn*, in the last term, obtained a rule *nisi* that this verdict might be set aside, and a new trial had, on the ground that the damages were, under the circumstances, exorbitant and excessive.

Mr. Serjeant *Adams* was now about to shew cause; and the learned Judge, at the conclusion of his report, having stated that he should have been better satisfied if the Jury had limited their verdict to twenty shillings—

Mr. Serjeant *Goulburn* offered to pay 20*l*. But this proposal was not acceded to; upon which—

Mr. Serjeant *Adams* submitted, that this being an action of tort, and the liberty of the subject was concerned, the Court would be most reluctant to interfere with the rights or privileges of a Jury, or direct a new trial, unless the damages were extravagant or outrageous; and here the question of damages was expressly within the province of the Jury. The conduct of the defendant, in ordering the plaintiff to be taken into custody, was inhuman and brutal; and after he had been confined a whole night, he offered him a still farther insult by tendering him two sovereigns, and saying, that he might either take them, or go before a magistrate. The plaintiff, therefore, accepted the money under duress. In *Bruce v. Rawlins* (a), where, in trespass against custom-house officers, for entering the plaintiff's house and searching for run goods, but they found none, and the Jury assessed the plaintiff's damages at 100*l.*, Mr. Justice *Yates* said—"the case must be very gross, and the damages enormous, for the Court to interpose." In *Redshaw v. Brook* (b), an action of trespass was brought under similar circumstances, and the Jury having found 200*l.* damages for the plaintiff, Lord Chief Justice *Wilmot* said—"although he might think them too large, yet how could the Court draw the line to fix the measure of damages." In *Sharpe v. Brice*, Lord Chief Justice *De Grey* said (c)—"that the same rule does not prevail upon questions of tort, as of contract; that, in tort, a greater latitude is allowed to the Jury; and the damages must be excessive and outrageous to require or warrant a new trial." In *Fabrigas v. Mostyn* (d), the Court were all of opinion that it was very difficult to interpose with respect to the *quantum* of damages in actions for any personal wrong, and that the Jury and not the Court are to estimate the adequate satisfaction. In *Huckle v. Money* (e), which was an action of trespass for an assault and false imprisonment,

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(a) 3 Wils. 61.

(b) 2 Wils. 405.

(c) 2 Sir W. Bl. 943.

(d) 2 Sir W. Bl. 929.

(e) 2 Wils. 205.

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Lord *Mansfield* said (a)—“ It is very dangerous for the Judges to intermeddle in damages for *torts*, it must be a glaring case indeed of outrageous damages in a *tort*, and which all mankind at first blush must think so, to induce a Court to grant a new trial for excessive damages.” In *Merest v. Harvey* (b), the Court thought that 500*l.* were not excessive damages in an action of trespass for sporting over the plaintiff’s land, although the defendant was in a state of intoxication at the time; and Mr. Justice *Heath* said, he remembered a case where a Jury gave 500*l.* for merely knocking a man’s hat off; and the Court refused a new trial. In *Huckle v. Money*, the plaintiff was a journeyman printer, and the Jury gave him 300*l.* damages, although he was only detained in custody six hours, and was treated with great kindness and civility. There, as here, the plaintiff was in a humble sphere of life; but, as Lord *Mansfield* said “ the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life, did not appear to the Jury in that striking light, in which the great point of law, touching the liberty of the subject, appeared to them at the trial.” Here, the conduct of the defendant must be looked at; he was not a magistrate, nor did he presume to act in that character; and there was no previous provocation by the plaintiff to warrant his being taken into the charge of a constable, and much less for his being kept in custody a whole night. The mere offer of two sovereigns to the plaintiff, on the following morning, cannot be considered a satisfaction for the injury done to the plaintiff, nor could it be pleaded as such; it was, in fact, an aggravation of the insult offered him on the preceding day; and in *Duberley v. Gunning* (c), where, in an action for criminal conversation, the Jury gave the plaintiff 5000*l.* damages, the Court refused to grant a new trial, which was applied for on the ground that the damages were excessive.

(a) 2 Wils. 207.

(b) 5 Taunt. 442; S. C. 1 Marsh. 139.

(c) 4 Term Rep. 651.

Mr. Serjeant *Goulburn*, in support of his rule.—Admitting that the Courts will not grant a new trial in an action of *tort*, on the ground of excessive damages, unless such damages be outrageous; yet the cases cited in support of that principle are wholly inapplicable to the present. In an action for criminal conversation, the question of damages is especially a question for the Jury, and the Court have no line to go by; and in *Duberley v. Gunning*, Mr. Justice *Ashhurst* said (a)—“There is another consideration, deserving of great weight, which is, that the Court never granted a new trial in such a case as this, for excessive damages; and yet many instances have occurred where the damages have been confessedly excessive.” In *Huckle v. Money*, the plaintiff was apprehended under a general warrant granted by the Secretary of State; and, as Lord *Mansfield* emphatically said (b)—“The Jury saw a magistrate over all the king’s subjects exercising arbitrary power, violating *Magna Charta*, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before the Jury.” Here, however, it appears that the defendant did not know that the plaintiff had been handcuffed; and if the defendant had pleaded accord and satisfaction, it would have been an answer to the action; as, when the plaintiff received the two sovereigns, and the half crown for the keep of the horse, he left the defendant’s house perfectly satisfied. The defendant therefore is only liable for nominal damages for the detention of the plaintiff during one night.

Lord Chief Justice TINDAL.—It appears to me, from the evidence at the trial, as reported to us by my brother *Gaselee*, that the damages in this case are so extravagant, that it ought to be submitted to another Jury. I do

(a) 4 Term Rep. 656.

(b) 2 Wils. 207.

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not intend to offer any comment on the cases which have been cited, neither do I mean to detract from or dispute their authority. I am always very averse to interfere with the province of a Jury, and shall never be induced to send a case down again, unless the damages are enormous or altogether disproportionate to the alleged cause of complaint. Now, this case appears to me to be an exception to the general rule, that the Court will not grant a new trial in an action of *tort*, unless the damages are outrageous;—as it appears by the evidence, that the plaintiff assented to receive a compensation offered by the defendant for the injury he had sustained; for, on the morning after the detention, he seems to have thought himself well off with the two sovereigns and the half crown the defendant gave him; and there was nothing like duress, for, after he had received the money, he partook of some refreshment which the defendant ordered for him, and left the house. If the plaintiff had a cause of action for the detention by the defendant when he came to the house on the following morning, it appears to me that he was compensated by the money he agreed to take; and, if the defendant had pleaded accord and satisfaction, I am strongly inclined to think that it would have been a bar to the action. As the Jury, with all those circumstances before them, gave a verdict for the plaintiff, with 100*l.* damages, I consider it to be an enormous sum, and far beyond what the plaintiff merits. Without therefore interfering with the authority of the cases cited, I think there ought to be a new trial.

Mr. Justice PARK.—I am of the same opinion, and own that I am much surprised to hear, that it has ever been supposed that this Court has ever had any wish to interfere with the due province of a Jury. I fully agree with the doctrine established by all the cases which have been

cited by my brother *Adams*, and the principle laid down by Mr. Justice *Yates*, in *Bruce v. Rawlins*, "that the case must be very gross, and the damages enormous, for the Court to interfere." Still, however, that must be applied to the circumstances of each particular case. In *Duberley v. Gunning*, the Court did not consider the damages to be excessive, because the Jury thought that the plaintiff had not connived at or consented to the infidelity of his wife, which the defendant had imputed to him. Here, however, the only question is, whether, under the circumstances, the damages the Jury have awarded the plaintiff are not excessive and enormous? I am clearly of opinion that they are. But we are not to decide that question, as all we are requested to do is, to send the case down to another Jury. Although, in *Merest v. Harvey*, Mr. Justice *Heath* is reported to have said, that he remembered a case where a Jury gave 500*l.*, for merely knocking off a man's hat; yet the grade of society in which the injured party moved must be looked at; for what would be a mere frolic as between two individuals of the same degree, might be an insult if offered to a nobleman or gentleman by a person of inferior rank.

Mr. Justice BOSANQUET.—As I have not heard the whole of the argument, I abstain from giving any opinion, and shall therefore content myself by expressing my entire concurrence with what has fallen from my Lord Chief Justice.

Mr. Justice ALDERSON.—Every case of this description must depend upon its own particular facts and circumstances. The case of *Huckle v. Money* does not appear to me to apply, as it was decided at a time of great political excitement. There the plaintiff, a journeyman printer, had been taken into custody under a general warrant, which Lord *Mansfield* considered mischievous and illegal; for

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he said—"to enter a man's house, by virtue of a nameless warrant, in order to procure evidence, is worse than the *Spanish* inquisition; a law under which no *Englishman* would wish to live an hour; it was a most daring public attack, made upon the liberty of a subject;" and his Lordship thought that it was a violation of *Magna Charta*. Here, however, the simple question is, what injury the plaintiff in fact sustained, and what compensation he might reasonably seek to receive from the hands of the Jury. It is every day's practice to grant a new trial in an action for an assault, if the damages are excessive; and here it appears, that although the plaintiff was handcuffed, it was done without the order or knowledge of the defendant; he therefore ought not to be responsible for that part of the charge. Besides, the plaintiff was kept at an inn during the night, and, on the following morning, he asked the defendant for money, when he took two sovereigns which the defendant offered him. He afterwards received two shillings and sixpence for the keep of his horse, and, having partaken of some refreshment, left the defendant's house. On the whole, therefore, I concur with the Court in thinking that this case ought to be reconsidered by another Jury, and that the rule for the new trial must be made—

Absolute.

Wednesday,
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DOE, on the Demise of WHITAKER v. HALES.

The attorney of a mortgagee, who was also the attorney of the mortgagor, applied to the tenant in possession of the mortgaged premises for rent to pay the interest due on the mortgage, and threatened to distrain if the rent were not paid:—*Held*, that the mortgagee thereby recognised the possession of the tenant as legal, and that the mortgagee could not maintain ejectment on a demise laid previously to such application by his attorney.

THIS was an action of ejectment, and brought to recover the possession of a public house in the occupation of the defendant. The day of the demise was laid in the de-

claration on the 25th *December*, 1829. At the trial, before Mr. Justice *Bosanquet*, at the last Summer Assizes at *Worcester*, it appeared that, in 1811, one *Austen* had mortgaged the premises in question to the lessor of the plaintiff. A witness was called for the plaintiff, who stated that he was the attorney for the lessor of the plaintiff, and also for *Austen* the mortgagor. That the lessor of the plaintiff directed the witness to apply for the interest due on the mortgage at *Lady-day*, 1830. That, on the 7th of *April* in that year, the witness applied to the defendant for rent to pay the interest, and told him that if he did not pay the rent, he (the witness) should take the steps the law allowed; that he believed he threatened to distrain if the rent were not paid. That he had received rent from the defendant four or five times, and that he had an account with *Austen* the mortgagor; that the witness paid the lessor of the plaintiff his interest, and retained the remainder on *Austen's* account to him the witness; that he never had any authority from the lessor of the plaintiff to receive rent for him. That the witness received the rent on account of *Austen*, and that he had before distrained for him and by his authority.—For the plaintiff, the case of *Pope v. Biggs* (a) was relied on, where it was decided, that a mortgagee, who had given notice to the tenants holding the mortgaged premises, under leases granted by the mortgagor *after* the mortgage, was entitled to receive from those tenants the rents actually due at the time of the notice, as well as those which accrued due afterwards:—and where such rents had been received by the agent of the mortgagor after his bankruptcy, and were not actually paid over, it was held, that the agent might retain such rents in order to pay the interest accruing due on the mortgage to the mortgagee, who had required him to do so; and that the assignees could not recover them. But the learned Judge was of opinion, on the testimony given by the

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(a) 9 Barn. & Cress. 245; S. C. 4 Man. & Ryl. 193.

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attorney as the agent of the lessor of the plaintiff, to the defendant, for rent in *April*, 1830, was a recognition of the defendant's tenancy, or an acknowledgment that he was not at that time a trespasser, and consequently that he could not have been such on the day of the demise in *December*, 1829. As, therefore, the plaintiff, through his attorney, had recognised the defendant's tenancy, and that he was lawfully in possession in *April*, 1830, the learned Judge thought it unnecessary to hear the defendant's counsel, and directed a nonsuit.

Mr. Serjeant *Russell*, in the last term, obtained a rule nisi, that this nonsuit might be set aside and a new trial had, on the ground that the plaintiff's attorney had demanded and received the defendant's money as rent due to the mortgagor, out of which he had taken upon himself to pay the interest due to the mortgagee. That the defendant having been always considered as tenant to the mortgagor, the mortgagee had a right to treat him as a trespasser. That the plaintiff having directed his attorney to apply to the mortgagor for interest in the first instance, the attorney properly applied to the defendant for rent to pay such interest. That there could be no doubt but that the plaintiff had the legal estate on the day of the demise laid in the declaration; and as default had been made in payment of interest by the mortgagor, the plaintiff as mortgagee was entitled to possession without giving a notice to quit or demanding possession. That at all events the nonsuit was premature, as it should have been left to the Jury to say, whether the defendant paid the plaintiff's attorney the rent on account of the mortgagor, for whom he had previously received it, and for whom he had before distrained; or whether he paid it on account of the interest due to the mortgagee?

Mr. Serjeant *Wilde* now shewed cause.—The question

is not, whether the lessor of the plaintiff received rent from the defendant as interest due from the mortgagor, but whether, by his own act, he did not recognise the defendant as being legally in possession of the premises at the time of the demand for rent by the plaintiff's attorney in *April*, 1830. The attorney was the general agent of the plaintiff as mortgagee, and was well acquainted with all the circumstances attending the mortgage, and the relative situations of the mortgagee and mortgagor. The attorney not only applied to the defendant for rent to pay the interest, but threatened to distrain if the rent were not paid; and although the defendant paid his rent to the attorney, who afterwards gave the lessor of the plaintiff the interest then due, yet the latter now seeks to treat the defendant as a trespasser, although he received the interest more than three months after the day of the demise as laid in the declaration. The plaintiff, by his own act, recognised the defendant as holding the premises, or being legally in possession in *April*, 1830; he, therefore, could not maintain ejectment, without a previous notice to quit, or at least a demand of possession; and, although in *Partridge v. Bere* (a), it was held that a mortgagor in possession of the mortgaged premises is merely a tenant by sufferance of the mortgagee; and in the late case of *Doe d. Roby v. Maisey* (b), that a mortgagee may recover in ejectment against the mortgagor, without a demand of possession before action brought; yet, if a mortgagee adopt the acts of his agent, the mortgagor, and treat the lessee as his, the mortgagee's, tenant, he thereby confirms the lease. So, if he recognises the tenant to be in the rightful occupation, he cannot disturb it; and here, the plaintiff must be bound by the acts of his attorney, who, having full knowledge of all the circumstances attending the mortgage, received money

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(a) 5 Barn. & Ald. 604.

(b) 8 Barn. & Cress. 767; S. C. 3 Man. & Ryl. 107.

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from the defendant *as rent*, for the purpose of paying the plaintiff the interest due to him on the mortgage. The plaintiff therefore cannot afterwards treat the defendant as a trespasser, or repudiate the authority of his attorney.

Mr. Serjeant *Russell*, in support of his rule.—The non-suit was not warranted by the facts disclosed by the plaintiff's attorney. The difficulty arose from his being the attorney of the mortgagor as well as of the mortgagee, and the only question is, whether the plaintiff received any money from the defendant as rent. The plaintiff never authorized the attorney to go to the defendant, but directed him to apply to the mortgagor for the interest; and the attorney expressly stated that he never had any authority from the plaintiff to receive rent for him, but that he received it on account of the mortgagor, for whom he had previously distrained. The plaintiff, as mortgagee, merely knew that the defendant was the tenant in possession of the premises, and the legal interest was in the plaintiff on the day of the demise. The mortgagor is a mere agent or tenant to the mortgagee, and the receipt of interest from the tenant or occupier will not deprive the plaintiff of his legal rights in his character of mortgagee; and it was incumbent on the defendant to shew some title in another person, in answer to that set up by the plaintiff. In *Birch v. Wright*, Mr. Justice *Buller* said (a)—“ a mortgagor is not considered as tenant at will in those proceedings which are in daily use between a mortgagor and mortgagee; I mean in ejectments brought for the recovery of the mortgaged lands. The mortgagor has no power of making leases to bind the mortgagee. He cannot, against the will of the mortgagee, do any act to disseise him; and the reason is, because the mortgagee, so long as he receives his interest, is, virtually and in the eye of the law,

(a) 1 Term Rep. 383.

in possession. The mortgagee has a right to the actual possession whenever he pleases; he may bring his ejectment at any moment that he will. He is also entitled to all the rents which have become due since his mortgage." How, then, can the occupier defend an action of ejectment, without shewing some title in answer to that set up by the mortgagee, particularly when the terms of the consent rule are, that the defendant shall confess lease, entry, and ouster, and insist upon title only? In *Pope v. Biggs*, Mr. Justice *Littledale* said (a), when a mortgage is executed, the mortgagee becomes the legal owner of the land, and is entitled to immediate possession, or to the rents and profits. In *Doe d. Fisher v. Giles* (b), this Court decided that a mortgagee might maintain ejectment against the mortgagor, although he remained in possession, without giving him notice to quit, or even demanding possession:—and in *Doe d. Roby v. Maisey*, Lord *Tenterden* said (c)—“the mortgagor is not in the situation of tenant at all, or, at all events, he is not more than tenant at sufferance; but in a peculiar character, and liable to be treated as tenant or as trespasser, at the option of the mortgagee.” It therefore follows, from all these authorities, that nothing but the receipt of rent by the mortgagee, as rent, can preclude his right to recover possession by an action of ejectment; and here the plaintiff’s attorney received the rent from the defendant for interest due to the mortgagee, and retained the remainder on account of the mortgagor.

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Lord Chief Justice TINDAL.—The question is, whether *Hales*, the defendant on the record, was a trespasser on the 25th December, 1829. This is an action of trespass and ejectment, and the lessor of the plaintiff is not entitled to recover, unless he shews that the defendant was a tres-

(a) 9 Barn. & Cress. 253. (b) 2 Moore & Payne, 749; S. C. 5 Bing. 421.

(c) 8 Barn. & Cress. 767.

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passer on the day of the demise laid in the declaration. If he were not, he had the legal right of possession. In order to shew that the defendant was not a trespasser on the 25th *December*, 1829, he proved that, in *April*, 1830, he was still in possession of the premises; and that an agent of the lessor of the plaintiff, the mortgagee, called upon the defendant, and applied to him for rent to pay the interest. The demand was *eo nomine* as rent, and the defendant was told that he would be distrained on if the rent were not paid. The defendant was only liable to pay rent for the occupation of the house, and the demand for rent was made by the agent of the mortgagee, who had full knowledge of all the circumstances as well as the relative situations of the parties; and it appears that the agent received the rent, and afterwards paid the interest to the mortgagee. If a person employs an agent, who has full knowledge of all the circumstances, and the principal receives a benefit from the acts of such agent, he stands in the same situation as the agent himself, and must be assumed to have the like knowledge. Although the sum paid to the mortgagee for interest did not amount to the whole of the rent received from the defendant, yet it was demanded as rent to pay the interest. In effect, therefore, it is the same thing as if the mortgagee himself had demanded rent, and received it from the defendant. As, therefore, the lessor of the plaintiff, as mortgagee, recognised and availed himself of the possession of the defendant in *April*, 1830, he cannot treat him as a trespasser in *December*, 1829. Although it has been said that the lessor of the plaintiff should not have been nonsuited, still, if the case had gone to the Jury, they must have come to the conclusion that there was a recognition of the defendant's tenancy after the day of the demise; and that was a question purely for their consideration; and as the point would, no doubt, have been raised by the defendant's counsel, I think the nonsuit was right.

Mr. Justice PARK.—I am clearly of opinion that the defendant adduced sufficient evidence at the trial to shew that he was in the legal possession of the premises sought to be recovered by this action, after the day of the demise laid in the declaration.

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Mr. Justice BOSANQUET.—The question which has been now raised on the part of the lessor of the plaintiff might, no doubt, have been left to the Jury; but, independently of that, I thought from the evidence of the plaintiff's attorney, that the plaintiff had recognised the possession of the defendant as a legal possession in *April*, 1830; and therefore that he could not be considered as a trespasser in *December*, 1829, the time of the demise as laid in the declaration. The attorney said, that he told the defendant, that, if he did not pay the rent, he should take the steps the law allowed, and that he believed he threatened to distrain if the rent were not paid. The sum the attorney received from the defendant was for the rent of the premises in question. There was no privity between the lessor of the plaintiff and the defendant; and by the attorney's demanding and receiving the rent, he recognised the defendant as being legally in the possession of the premises, in *April*, 1830.

Mr. Justice ALDERSON.—If the demise had been laid subsequently to the month of *April*, 1830, the question would be altogether different, and there might then be some ground for a new trial. But the only question is, not whether the defendant was tenant to the lessor of the plaintiff, but whether he had been recognised by the plaintiff as being in the legal possession or occupation of the premises after the day of the demise. If he had been so recognised, the lessor of the plaintiff could not treat him as a trespasser. So, if he received his interest out of the rent due, he could not be entitled to recover in this

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action. If the mortgagor and mortgagee had gone together to the defendant, and the former had demanded rent which had accrued and become due since the day of the demise, and had immediately paid it over to the mortgagee for interest, if he knew that the defendant was at that time in the occupation of the premises, and the mortgagee signified no dissent, it would be too much to say that he could afterwards treat the defendant as a trespasser *ab antecedenti*. It would be contrary both to law and to justice. I am therefore of opinion that the nonsuit was right, on the abstract point, that the attorney, as the authorized agent of the mortgagee, recognised the defendant as a tenant, and being in the legal possession of the premises after the day of the demise laid in the declaration.

This rule therefore must be—

Discharged.

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KAY v. GRACE and Another.

The defendants, as overseers of the poor, distrained the goods of a party for poor's rates, under a warrant of a magistrate, such goods having been previously distrained by the landlord for rent, whose bailiff remained in possession. The magistrate, at the time of granting the warrant, told the overseers not to distrain any property which might have been previously distrained for rent:—*Held*, that the overseers were not entitled to the protection of the 6th section of the statute 24 Geo. 2, c. 44; and therefore, that the landlord might maintain trespass against them, without a previous demand of the perusal and copy of the warrant.

THIS was an action on the case, by which the plaintiff sought to recover damages from the defendants, for the rescue of certain goods which he had distrained for rent.

At the trial, before Lord *Tenterden*, at the last Assizes for the county of *Hertford*, it appeared that the plaintiff had let a farm of his to one *Hoare*; and that, in *October*, 1829, he distrained his goods and cattle for rent in arrear; that the bailiff continued in possession until the month of *January* following; that, about the latter end of *December*, the defendants, overseers of the poor, supposing that there was some collusion between the plaintiff and his tenant *Hoare*, to protect him from the payment of poor's rates, ob-

tained a distress warrant from a magistrate, and entered *Hoare's* house, and seized and took away some of his goods as a distress for the poor's rates so due from the latter, such goods having been previously seized by the plaintiff's bailiff, who was then in possession. It also appeared, that, when the defendants applied for the warrant, the magistrate, who had been previously informed of the circumstances, cautioned the defendants from taking any property of *Hoare's* which might have been distrained by the plaintiff for rent. The plaintiff, without demanding a perusal or copy of the magistrate's warrant, commenced the present action against the defendants; and Lord *Tenterden*, after summing up the whole of the evidence to the Jury, left it to them to consider whether there was any collusion between the plaintiff and his tenant, in keeping the bailiff in possession colourably, and with a view to protect *Hoare* from the payment of the poor's rates. The Jury thought there was no collusion, and found a verdict for the plaintiff, damages 42*l.*; leave being reserved to the defendants to move to set it aside and enter a nonsuit, in case the Court should be of opinion that the plaintiff should have demanded a perusal and copy of the magistrate's warrant, previously to the commencement of the action, pursuant to the statute 24 *Geo. 2*, c. 44, s. 6 (a).

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Mr. Serjeant *Andrews*, in the last term, accordingly obtained a rule nisi, that a nonsuit might be entered, or that a new trial might be had, on the ground that the verdict was against evidence, as the plaintiff failed to prove that he had the legal possession of *Hoare's* goods; and, as the bailiff remained so long on the premises without the plaintiff's proceeding to a sale, it must be assumed that he connived with his tenant to keep up a mere colourable possession, in order to prevent the overseers from levying for the poor's rates.

(a) See this section, *post*, p. 144.

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Mr. Serjeant *Wilde* now shewed cause.—There is no pretence to disturb the verdict, to which the plaintiff was clearly entitled: it has not been contended, that the rent was not *bond fide* due to *Hoare* from his tenant; the plaintiff allowed the sale of the property distrained to be postponed, as a great part of it consisted of corn, which was not fit to be carried to market; and the bailiff remained in possession from the time of the distress to the seizure and removal of the goods by the defendants, and continued there until the month of *January* following. The case of a landlord and tenant differs materially from a tradesman or other individual, whose goods are distrained upon or taken in execution, as it is for the advantage of the landlord to give his tenant a reasonable time for the payment of his rent; and if growing crops are distrained, it would be for the interest of the landlord that the tenant should have time to reap and thrash the corn, as he might be able to satisfy the rent when he could take it to market. With respect to the nonsuit, this is not a case within the intent or meaning of the 6th section of the statute 24 *Geo. 2*, c. 44, which was meant to prevent a constable or other officer, when acting in obedience to the warrant of a magistrate, from being answerable on account of a want of jurisdiction in such magistrate; and although, in the case of *Harper v. Carr* (a), it was held, that churchwardens or overseers taking a distress for a poor's rate, under a magistrate's warrant, are entitled to the protection of the statute; yet here, there was no complaint that the warrant was informal, or that it had been improperly granted, or that the magistrate had not jurisdiction; on the contrary, he cautioned the defendants not to take the goods which had been previously distrained by the plaintiff for rent. In *Parton v. Williams* (b), a constable acting under a warrant of distress issued by two Justices, commanding him to take the goods

(a) 7 Term Rep. 270.

(b) 3 Barn. & Ald. 330.

of *A.*, took the goods of *B.*, believing them to belong to *A.*; although it was held that he was entitled to the protection of the 8th section of the statute, which requires the action to be brought against him within six months, yet the Court drew a distinction between that section and the 6th; and Lord Chief Justice *Abbott* and Mr. Justice *Bayley* said, that the 6th section was intended to protect the officer in those cases only where the Justice remains liable; and that, to bring the officer within it, he must act strictly in obedience to his warrant, and within the limits of the authority communicated to him by the magistrate. Here, the magistrate was bound to grant the warrant of distress to levy for the poor's rates, on the application of the defendants, but, at the time, he told them not to take the goods distrained; and as they acted contrary to his direction, it was not necessary for the plaintiff to demand a perusal and copy of the warrant, as the magistrate himself acted rightly, and could on no ground be rendered responsible.

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Mr. Serjeant *Adams*, in support of his rule.—As the defendants acted under the warrant of a magistrate, they are within the protection of the 6th section of the statute. The plaintiff's tenant had long refused or delayed to pay the poor's rates. The defendants, therefore, complained to a magistrate, which it was their duty to do; and although the plaintiff might have distrained on the property of his tenant for rent, it does not follow that all of the goods were distrained; and, in *Parton v. Williams*, Mr. Justice *Bayley* said (a): "When a constable is acting *bond fide*, and with an honest opinion that he is discharging his duty, and that he is acting at the very time in obedience to the warrant of a magistrate, I am of opinion that he is entitled to the protection of the 8th section of the statute." And although he drew a distinction between that section and the 6th, the defendants are protected under the latter, as they

(a) 3 Barn. & Ald. 335.

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did not act perversely, or take the goods of a wrong person. At all events, the defendants are entitled to a new trial, as it must be assumed that the plaintiff's object, by allowing the bailiff to remain so long in possession, was to prevent the defendants' levying for the poor's rates.

Lord Chief Justice TINDAL.—This rule was obtained on two grounds:—*first*, that, by the effect and operation of the 6th section of the statute 24 Geo. 2, c. 44, the plaintiff is not entitled to recover, because there had been no demand of a perusal and copy of the warrant under which the defendants acted, previously to the commencement of the action, which, it was submitted, was a ground for entering a nonsuit;—and, *secondly*, that the defendants were entitled to a new trial, as the verdict was against the evidence. As to the first objection, upon looking at the 6th section of the statute, it seems to me that it applies only to cases where there has been a defect of jurisdiction in the magistrate who has granted the warrant, and the officer has acted in strict obedience to it. Before the passing of that act, the consequences of a want of jurisdiction in the Justice who issued the warrant, frequently fell on the officer, who was bound to obey it. It was, therefore, most unjust, where the officer acted under the order of his superior, or in obedience to the warrant, that he should be responsible on account of any defect of jurisdiction in the magistrate; and it was therefore provided, “that no action shall be brought against any constable, headborough, or other officer, or against any person or persons acting by his order and in his aid, for any thing done in *obedience* to any warrant under the hand or seal of any Justice of the Peace, until *demand* hath been made by the party intending to bring such action, of the perusal and copy of such warrant, and the same hath been refused or neglected for the space of six days after such demand:—and that in case, after such demand and compliance therewith, by shewing the said warrant to, and permitting a co-

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py to be taken thereof by the party demanding the same, any action shall be brought against such constable, &c., &c., without making the Justice or Justices who signed or sealed the said warrant, defendant or defendants;—that on producing and proving such warrant at the trial of such action, the Jury shall give their verdict for the defendant or defendants, notwithstanding any defect of jurisdiction in such Justice or Justices;—and if such action be brought jointly against such Justice or Justices, and also against such constable, &c., &c., then, on proof of such warrant, the Jury shall find for such constable, &c., &c., notwithstanding such defect of jurisdiction as aforesaid.” That enactment cannot apply to this case, as the magistrate had not exceeded his authority, but issued a legal warrant; neither did the defendants act in obedience to it, for they took goods which were already *in custodia legis*. This case therefore falls within the principle established in *Parton v. Williams*, where a constable, acting under a warrant from a magistrate, commanding him to take the goods of *A.*, took the goods of *B.* by mistake, believing them to belong to *A.*, it was held that he was not within the sixth section of the statute, for, as Lord Chief Justice *Abbott* said (*a*)—“the sixth section is obviously intended to protect the officer in those cases only where the Justice remains liable. And it is necessary, in order to bring the officer within it, that he should act most strictly in obedience to his warrant.” With respect to a new trial, it seems to me that the question was properly left to the Jury, *viz.* whether there was any connivance or collusion between the plaintiff and his tenant *Hoare*, by keeping the bailiff so long in possession, without proceeding to a sale of the goods; and Lord *Tenterden* has not reported to us that he is dissatisfied with the verdict. It appears that corn was distrained, and it was therefore reasonable for the plaintiff to allow his tenant time to

(*a*) 3 Barn. & Ald. 333.

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thrash and carry it to market, as he would have sustained a great loss if the plaintiff had proceeded to an immediate sale.

Mr. Justice PARK.—I am of the same opinion. It is admitted by my brother *Wilde*, that the defendants, as overseers of the poor, are entitled to the protection of the statute; but, from the observations which have been made by my Lord Chief Justice, it appears to me to be quite clear that this case does not fall within it, because the sixth section was only meant to protect the officer in cases where the Justice remains liable, and the officer has acted in strict obedience to the warrant or the direction of the magistrate. Here the magistrate did nothing wrong or improper; he could not refuse to grant the warrant of distress; but, when he did so, he warned the defendants not to seize or levy on the goods which had been previously distrained for rent. He therefore acted with the greatest possible caution. Although it has been said, that the plaintiff allowed the bailiff to remain in possession an unreasonable time, it was a question for the Jury. It appears to me, that a landlord may very reasonably allow his tenant time to thrash and sell his corn; and here it appears that the distress was made in *September*, when the corn had been but lately cut. There seems to be no ground for assuming collusion between the plaintiff and his tenant; and it has not been suggested that the rent was not *bond fide* due, or that the distress was improperly made in the first instance. My Lord *Tenterden* has not stated that he is dissatisfied with the verdict, and the question was most properly left to the Jury; and it would be too much for me to say that they have come to a wrong conclusion.

Mr. Justice ALDERSON (a).—The sixth section of the statute 24 Geo. 2, c. 44, differs entirely from the eighth, and

(a) Mr. Justice *Bosanquet* was at Chambers.

bears a different construction; and the distinction was pointed out by the Court in *Parton v. Williams*. The object of the sixth section is to compel the officer to produce the warrant under which he acted, and to protect him where the magistrate has no jurisdiction; and if the plaintiff had required a perusal and copy of the warrant, and it had been granted, the magistrate must have been joined as a defendant; and if he had been sued with the overseers, it is quite clear that he would be entitled to a verdict, as he was bound to grant the warrant to distrain the goods of *Hoare* for the poor's rates then due, and he had a jurisdiction to issue such warrant. So, the defendants, on producing the warrant, would have been excused, because they were bound to execute it; but, if they did not act in strict obedience to the warrant, or within the limits of the authority communicated to them by the magistrate at the time he granted the warrant, they are not within the protection of the statute. But the point has been already decided in the case of *Crosier v. Cundey* (a), where a constable, having a warrant to search for certain specific goods alleged to have been stolen, found and took away those goods, and certain others, also supposed to have been stolen, but which were not mentioned in the warrant, and were not likely to be of use in substantiating the charge of stealing the goods mentioned in the warrant; it was held that the constable was liable to an action of trespass, although Lord Chief Justice *Abbott* had nonsuited the plaintiff at the trial, as he had not demanded a perusal and copy of the warrant. So, in *Bell v. Oakley* (b), where the defendants, in order to levy a poor's rate under a warrant of distress granted by magistrates, broke and entered the house; it was held, that they might be sued in trespass without a previous demand of the perusal and copy of the warrant, as they had exceeded their au-

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(a) 6 Barn. & Cress. 232; S. C. 9 Dow. & Ryl. 224.

(b) 2 Mau. & Selw. 259.

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thority, and had not acted in obedience to the warrant; and Mr. Justice *Dampier* said (a), "the case of *Money v. Leach* (b) decided, that, where the Justice cannot be liable, the officer is not within the protection of the statute." In *Sly v. Stevenson* (c), it was held, that a constable, who delivers a copy of his warrant to the party grieved, cannot thereby discharge himself, unless the party has a right of action (supposing the warrant illegal) against the magistrate under whom he acts; and here it is quite clear, that, if the defendants had produced the warrant, the plaintiff would have had no ground of action against the magistrate who granted it, as he had not only jurisdiction, but was bound to grant the warrant. With respect to the verdict being against the evidence, I concur with the Court in thinking that the question was properly left to the Jury; and I do not think that they have come to a wrong conclusion. This rule therefore must be—

Discharged (d).

(a) 2 Mau. & Selw. 261.

(b) 3 Burr. 1742; S. C. 1 Sir W. Bl. 555.

(c) 2 Car. & Payne, 464.

(d) In *Lyons v. Golding*, Mr. Justice *Park* said, (3 Car. & Payne, 587), "trover is an action in *tort* for the recovery of damages; and I think that, to entitle a plaintiff

to maintain such an action against a constable acting under a Justice's warrant, he must demand perusal and copy of the warrant, under the statute 24 Geo. 2, c. 44; and if perusal and copy be given, he cannot recover, unless he join the Justice as a defendant." See also *Smith v. Wiltshire*, 3 B. Moore, 322.

Thursday,
Jan. 27th.

The Earl of VERULAM v. HOWARD.

The rent reserved in a lease of copyhold premises, is not conclusive as to the amount of a fine payable to the lord; for the tenant may shew that the actual value of the premises demised is less than the rent reserved, and the fine must be estimated according to the improved yearly value.

THIS was an action of *assumpsit* for a fine due to the plaintiff, as lord of the manor of *Gormanbury*, on the ad-

mission of the defendant to certain copyhold premises within the manor.

At the trial, before Lord *Tenterden*, at the last Assizes at *Hertford*, it appeared that the premises in question consisted of a public-house called the *Leather Bottle*, which the defendant, in 1828, had let at a public auction for a term of eight years, at the annual rent of 112*l.*, and the tenant covenanted in the lease to keep the premises in repair, to insure, and to expend a certain sum upon them previously to the expiration of the term. The plaintiff claimed 200*l.* as two years' value of the premises, and the lease was given in evidence to shew that they had been let by the defendant at 112*l. per annum.*

For the defendant, several auctioneers and other persons were called as witnesses, who stated, that the premises would not be worth one half the value for which they were let, if they were not occupied as a public-house, and that the biddings were made at the auction, in consequence of the house being situate near a wharf and canal. The defendant also proved that formerly the house was let at 12*l. a-year*; and that, in 1793, 8*l.* only were paid as a fine on the admission of a tenant, which fine was estimated as being two years' value of the premises. His Lordship thought that the lease was the best evidence by which the value was to be estimated; but he left it to the Jury to say whether the premises had been rightly assessed at 100*l. a-year*, and what was their value at the time the lease was granted; and said that, although the house was a public-house, it was not likely that the defendant contemplated that his tenant would lose his licence before the expiration of the term; and if the Jury thought that the fine did not exceed two years' improved value of the premises, the plaintiff would be entitled to a verdict. They however found a verdict for the defendant.

Mr. Serjeant *Wilde*, in the last term, obtained a rule

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nisi that this verdict might be set aside and a new trial had, on the ground, that the defendant, after he had let the premises by auction for the term of eight years, at the annual rent of 112*l.*, was estopped from saying that they were not worth 100*l.*, and that the fine of 200*l.* was a reasonable fine, to which the plaintiff was fairly and legally entitled.

Mr. Serjeant *Andrews* now shewed cause.—There is no ground to disturb the verdict which the defendant has obtained. It was competent to the Jury to find the value of the premises; and though the defendant might have let them for 112*l. per annum*, their value may have since been depreciated. Although, in *Halton, Bart. v. Hassel (a)*, Lord *Hardwicke* was of opinion, that the fine should be set or estimated according to the improved yearly value; yet such value cannot apply to a public-house, the enjoyment of which as such is precarious; as the licence might be lost by the misconduct of the occupier, or the magistrates might refuse to renew it. Besides, the house was only let for eight years, and the true criterion to estimate the value is, what it would sell for, and not for what it might be let by the year.

Mr. Serjeant *Wilde*, in support of his rule.—With respect to the *quantum* of the sum which a lord of a manor may demand as a fine on the admission of a tenant to copyhold premises within the manor; it is an established rule, that he may demand two years' value, and the fine must be estimated according to the improved yearly value; and, if the tenant reserves a yearly rent to himself, that is the true and ascertained value. If the term had been extended to fourteen or twenty-one years, the same fine would have been payable; and here, the defendant

(a) 2 Str. 1042.

did not imagine that the licence would be lost during the eight years the party was to hold the premises under the lease, and the probability is, that he will continue to occupy to the expiration of the term. The lease is the true test of the improved value of the premises, and by which alone it could be ascertained; and in *Denny v. Lemman* (a), the Court were of opinion, that the lord was not bound to aver or shew that the fine assessed was reasonable; but it must come on the copyholder's side, to shew the circumstances of the case, to make it appear to the Court to be unreasonable; for the fine in law is arbitrary, and is due to the lord of common right: and it is only in point of excuse to the tenant, if it be unreasonable, which the Court cannot judge but upon the fact agreed; and the copyholder, if he be a defendant, may plead not guilty; and then it shall come in evidence whether the fine were unreasonable or not. And, here, the defendant has admitted, and shewn by the lease, that the premises were of the improved annual value of 112*l*.

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Lord Chief Justice TINDAL.—The Jury, having found a verdict for the defendant, have in effect said, that they did not consider the annual value of the premises to amount to the rent reserved by the lease. It was purely a question for their consideration, and they were directed to find for the plaintiff, if they thought the fine did not exceed two years' improved value of the premises. The substantial question for us now to consider is, whether a lease granted by the defendant being in existence, and by which the annual amount of the rent was reserved, such instrument is to be deemed conclusive as against the defendant. I am not prepared to say, that it should be so deemed. The reservation of the rent was no doubt weighty evidence against the defendant, but it was for the Jury

(a) Hobart, 135.

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to determine what effect they would give to that evidence. The law has laid down the rule, that the fine payable to the lord, on the admission of a copyhold tenant, must be limited to two years' value of the premises, and not to two years' rent; and that the estimation must be according to the improved yearly value and not according to the rent reserved under a lease; and whether the fine be excessive or not, has, from the earliest time, been a question for the determination of a Jury. If the rent reserved in a lease were to be deemed conclusive evidence, a lease of much shorter duration than the present, for instance, a lease for two years only, would be entitled to have the same construction put upon it, although, at the expiration of the two years, the property might be of less value than at the time the lease was granted. The case of *Halkon v. Hassel* is conclusive to shew, that the fine must be estimated according to the improved yearly value, and not according to the rent reserved. There, the rent reserved was 16*l.* only, but it appeared that the premises were of the value of 50*l. per annum*; and Lord *Hardwicke* was of opinion that the fine should be set according to the present improved value, which was all the lord has to look after; for, if it were otherwise, it might open a door to defeat the lord. If, therefore, the lord is not estopped by the amount of the rent reserved, neither is the tenant; and the improved yearly value means, not the accidental value, but the possibly continuing value, or, in other terms, the fair annual average value during the whole period over which the fine is to extend. In this case, there was evidence on both sides as to the different modes of the enjoyment of the premises, which might cause the value to vary considerably; and I cannot say that the Jury came to a wrong conclusion by thinking that the fine was not a reasonable fine, or that it exceeded two years' improved value of the premises; and I therefore think that there is no ground to disturb the verdict.

Mr. Justice PARK.—I am of the same opinion.

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Mr. Justice BOSANQUET.—The fine was assessed by the lord of the manor at an assumed value of 100*l. per annum*. The Jury have in effect found that the property was not worth so much, although the lease was *prima facie* evidence as to the amount of the rent reserved. I am not prepared to say, that the Jury have done wrong, by considering that the fine exceeded two years' improved value of the premises, particularly as the defendant adduced evidence to shew that the mode of occupation had varied, and that the house would not have let for so much, had it not been a public-house.

Mr. Justice ALDERSON concurring—

Rule discharged.

RHODES v. INNES.

Friday,
Jan. 28th.

A RULE was obtained by Mr. Serjeant *E. Lawes*, on a former day in this term, calling upon the plaintiff to shew cause why the appearance entered by him for the defendant, according to the statute 12 *Geo. 1, c. 29*, and the notice of declaration, and all subsequent proceedings, should not be set aside, and why the plaintiff should not pay the defendant his costs. The motion was founded on an affidavit of the defendant, which stated that he had never received a copy of a writ or any other proceeding in this action, other than a paper writing;—upon which he wrote a letter to the plaintiff's attorney, stating that a

The plaintiff's attorney delivered a letter, containing the copy of a writ, to the defendant's son, at the defendant's house, and he promised to give it to his father. The defendant moved to set aside the proceedings, on an affidavit that he had never received the process; but the son made no affidavit:—*Held,*

that the service on the son was equivalent to a service on the father, and that the latter should have sworn that he had never seen the writ.

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notice of declaration had been left at his house in his absence, but that there must be a mistake respecting it, as he had never received any process in any such cause.

Mr. Serjeant *Wilde* now shewed cause, on an affidavit of the plaintiff's attorney, which stated that he served the defendant with a true copy of a writ of *capias ad respondendum* at the suit of the plaintiff against the defendant, by delivering the same copy (which was inclosed in a letter) to, and leaving it with, a son of the defendant at his residence in *Wells Street, Oxford Street*. It was also sworn, that the son was desired to give the letter in which the copy of the writ was inclosed to his father, which he promised to do. This, the learned Serjeant submitted, was equivalent to personal service, particularly as the defendant does not deny that he knew that the letter containing the writ had been left with his son.

Mr. Serjeant *E. Lawes*, in support of his rule.—The plaintiff was not entitled to enter an appearance for the defendant under the statute, except upon affidavit made and filed, that the latter had been *personally* served with a copy of the writ; and service on the son cannot be deemed a *personal* service on the father. In *Topping v. Fuge* (a), it was held, that if, a plaintiff having served an irregular process, the defendant gives him notice of the irregularity, it is an exception to the ordinary rule, that the party applying to set aside irregular proceedings must come before the other party has taken any further step in the cause; and here, the defendant, on receiving a notice of declaration, immediately informed the plaintiff's attorney by letter, that there must be a mistake, as he had never received any process in the cause.

(a) 5 Taunt. 330.

Lord Chief Justice TINDAL.—This motion, to set aside the appearance which the plaintiff had entered for the defendant, and all proceedings subsequent thereto, was founded on the statute 12 Geo. 1, c. 29, the 1st section of which enacts, that “if the defendant, having been served personally with process, shall not appear at the return of the process, or within four days after such return, it shall and may be lawful to and for the plaintiff, upon affidavit being made and filed in the proper Court, of the *personal service* of such process, to enter a common appearance, or file common bail for the defendant, and to proceed thereon as if such defendant had entered his appearance, or filed common bail (a).” The question in this case then is, whether there has either been an affidavit of *personal service* of the writ, or what is equivalent to it. There is no magic in the word *personal*, and a personal service of process may be waved by particular circumstances, or by the conduct of the party. Has there then not been virtually a personal service on the defendant? The plaintiff’s attorney delivered a letter containing the writ to the defendant’s son, who promised to deliver it to his father, and the son has made no affidavit that he did not give the letter to his father; neither does the latter state that he did not receive it. Now, if the Court have any reason to believe that the defendant knew that the writ was delivered to his son, it may dispense with the necessity of *personal service* on the former. In *Smith v. Wintle* (b), where the plaintiff put a copy of a writ through a crevice of a door, the defendant having locked himself in, and the plaintiff saw him through the crevice, and told him what the paper put through was; the Court held the service to be sufficient, and discharged a rule obtained by the defendant for setting

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(a) But see the statute 5 Geo. 2, c. 27, and Tidd’s Practice, 9th Edit. Vol. 1, 241.

(b) Barnes, 2nd Edit. quarto, 405.

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aside the proceedings, upon an affidavit that he had never been served with process. The late statute, 7 & 8 Geo. 4, c. 71, requires that a defendant shall be served *personally*, where the cause of action shall not amount to 20*l.*, in the same manner as by the statute 12 Geo. 1; and here, although no actual affidavit was made or filed, that *the defendant had been personally served*, yet the defendant should have gone further, and sworn that he had never seen the letter, or the writ, or taken them into his hands. The son received the letter, and promised to give it to his father, but he does not state that he did not do so, or what became of it. He might have told the defendant that the letter contained a writ; and the latter only swears that he never received the writ. I am therefore of opinion, that this rule ought to be discharged.

Mr. Justice PARK.—When the plaintiff's attorney delivered the letter containing the copy of the writ to the defendant's son, and desired him to give it to his father, which he promised to do, it was equivalent to service on the father; and the son should have at least shewn us that he did not do so. Although personal service may be necessary, yet if we see, or can collect from circumstances, that a fraud is attempted, or an evasion of the statute, the Court will not permit the defendant to avail himself of it, or elude personal service by a mere trick. The case of *Smith v. Wintle* appears to me to be in point, where the defendant locked himself up in an office or room, and it was held sufficient to put the process through a crevice of the door; and here, the defendant has merely sworn that he had never received any process, and not that he had never seen it.

Mr. Justice BOSANQUET.—If the defendant's son had done what he was requested and promised to do, or shewed the writ to his father, and he had requested him to put it in the fire, it would be equivalent to a personal service.

The son, however, has made no affidavit on the subject; and he should at least have shewn us what he did with the letter, or what became of the writ.

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Mr. Justice ALDERSON.—I quite agree with the Court, in thinking that this rule ought to be discharged. The defendant might not have been actually served personally with the writ, as he might not have chosen to receive it; but he has not sworn that he never saw the letter or its contents, but merely that he never received any process. The whole proceeding appears to me to be a trick between the defendant and his son for the purpose of evading the statute.

Rule discharged.

HENSHALL, Executrix, v. MATTHEW.

Saturday,
Jan. 29th.

ON the 1st *October*, 1819, the defendant executed a warrant of attorney, authorizing one *Matthew Henshall* to enter up judgment against him for 400*l.*, and, by a memorandum or defeazance thereon, it was stated that the warrant of attorney was given for securing the payment from the defendant to *Henshall*, his heirs, executors, administrators, and assigns, of the sum of 200*l.* and interest, on the days and in manner therein specified.

A warrant of attorney authorised *M. H.* to enter up judgment against the defendant, and by the defeazance it was stated that the warrant of attorney was given to secure payment to *M. H.*, his heirs, executors, administrators, and assigns:—*Held*, that judgment could not be entered up by the executrix of *M. H.* after his death, as the warrant of attorney only authorised *M. H.* himself to enter up judgment.

Mr. Serjeant *Jones*, on an affidavit, that the plaintiff died in *November*, 1820, leaving a will, by which he constituted his widow his executrix; that she had since married; and that, by the settlement made on her marriage, the debt secured by the above warrant of attorney was assigned to two persons as trustees for the wife—moved for leave to enter up judgment on this warrant of attorney, at the suit of the executrix. The learned Serjeant submitted, that, as the

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instrument was given to secure the payment of a certain sum to the plaintiff and his personal representatives, his executrix might enter up judgment after the death of the testator, as he himself might have done during his life-time. In the case of *Coles v. Haden* (a), where a warrant of attorney was given to enter up judgment at the suit of *A. B.* (the testator), his heirs, executors, or administrators, the Court allowed judgment to be entered up at the suit of the executor.

Lord Chief Justice TINDAL.—In that case, the words of the warrant of attorney extended to authorize the entering up judgment at the suit of the testator, his heirs, executors, or administrators, whilst here the body of the instrument authorized the testator alone to enter up judgment. An authority of this nature must be strictly pursued, and we cannot supply any supposed omission of the parties; and although it appears by the defeazance, that the warrant of attorney was given to secure to *Henshall*, the testator, his heirs, executors, administrators, and assigns, a particular sum, yet it only follows as an inference of law; and as the testator alone was empowered to enter up judgment, I think his executrix is not entitled to make this application.

The rest of the Court concurring—

The learned Serjeant took nothing by his motion (b).

(a) Barnes, 2nd edit., quarto, 44. Term Rep. 257; *Short v. Coglein*.
 (b) See *Cowie v. Allaway*, 8 1 Anst. 225.

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BUTT, Plaintiff; NOEL and Wife, Deforciant.

THIS was a fine *sur cognissance de droit*, of certain lands, which were stated in the concord to belong to one *Middleton* and wife, for the life of the wife, with remainder to the husband for life, if he should survive his wife; with remainder to *F. Gates*, and his heirs, during the lives of the husband and wife, and the life of the survivor of them; with remainder to *G. C. Agar* and Lord *Winchelsea*, for a term of five hundred years, to be computed from the death of the survivor of *Middleton* and wife, with remainder, after the expiration of the said term, and subject thereto, to the first and every other the sons of *Middleton* and wife, in tail male; with remainder to the daughters as tenants in common in tail general; with cross remainders between them, with reversion in fee to the plaintiff. In the deed to lead the uses, there was a covenant to levy a fine of the reversion. In the indentures of the fine, the Chirographer had struck out the remainders to *Gates*, *Agar*, and Lord *Winchelsea*, as he considered them to be unnecessary to the due operation of the fine.

The Court ordered the indentures of a fine to agree with the concord, by the insertion of all the limitations specified in the concord.

Mr. Serjeant *Russell* now moved that the indentures might be made to correspond with the concord, by introducing the above limitations, which the Chirographer had erased; and the learned Serjeant submitted, that, unless this were done, the covenant to levy a fine of the reversion could not be duly or fully performed.

Lord Chief Justice TINDAL.—I see no objection to this application. Strictly speaking, the limitations are legal estates, and the indentures of the fine ought to agree with the concord, which is the substance of the fine; and in the indentures the whole of the proceedings ought to be set out.

The rest of the Court concurring—

Fiat.

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A wharfinger having acknowledged that certain timber on his wharf was the property of the plaintiff:—*Held*, that he was thereby estopped from disputing the plaintiff's title in an action of trover, and it is not necessary that the acknowledgment should be in writing.

GOSLING v. BIRNIE.

THIS was an action of trover, and brought to recover five hundred cart loads of oak timber, in the possession of the defendant, a wharfinger at *Basingstoke*, and which the plaintiff alleged to be his property. The defendant pleaded the general issue.

At the trial before Lord Chief Justice *Tindal*, at *Guildhall*, at the Sittings after the last *Trinity* Term, the facts proved were as follow:—

On the 9th *October*, 1829, one *Ross* had contracted to sell the timber in question, which was then standing on an estate in *Hampshire*, to a person of the name of *Allum*, for 11*l.* 9*s.*, which sum was to be paid on the delivery of the timber, which, when felled, was marked with the letter *A.* (the initial of *Allum's* surname), and 20*l.* or 30*l.* was to be paid by him when half the timber should be delivered on the defendant's wharf at *Basingstoke*. On the 23rd *October*, *Allum* paid *Ross* 10*l.* on account, and, in the following week, the further sum of 30*l.* The timber was sent to the defendant's wharf, and he was told that it had been sold to *Allum*, who had marked the whole of it. At the time of the delivery of the timber at the wharf, 18*l.* 9*s.* were due to the defendant for cartage, which sum, *Allum*, according to an order from *Ross*, paid to the defendant's agent in *London*. On the 27th *October*, *Ross* had given *Allum* notice, that, unless he fulfilled his contract by the 29th, he, *Ross*, should consider that he was no longer bound by it. On the evening of the 5th *November*, *Ross* went to *Allum*, informing him, that all the timber was then at the defendant's wharf, and that unless the balance due in respect thereof was paid on the following day, he, *Ross*, would re-sell the timber, and hold *Allum* responsible for any loss that might arise on such sale. The money not having been paid by *Allum* on the 6th *November*, *Ross*, on the 7th, sold the timber to the plaintiff, and at the same time gave a

written order to the defendant, to deliver it to the plaintiff upon receiving the amount of the cartage then due. The plaintiff shewed the order to the defendant, and paid the sum due for cartage; upon which the latter said to the plaintiff—"Very well, I will hold the timber for you." A few days afterwards the defendant told some sawyers in his employ, that the timber belonged to the plaintiff; and, on the 24th *December*, the defendant sent the plaintiff a bill for wharfage and other dues, and stated in a letter in which the bill was inclosed—"I am not aware that there are any other charges on *your* timber." On the 1st *November*, however, *Allum*, not knowing that the timber had been transferred to the plaintiff, paid the balance due to *Ross* into the *Basingstoke* Bank, on his (*Ross's*) account.

For the defendant, it was submitted, that the timber was the property of *Allum*, to whom *Ross* had sold it, long before he re-sold it to the plaintiff; and that as *Allum* had made payments to *Ross* on account of the timber before the sale to the plaintiff, he could not be entitled to recover in trover. His Lordship however thought, that as there had been no actual delivery of the timber to *Allum*, and he had not paid the balance due to *Ross* before the re-sale to the plaintiff, the latter was entitled to recover, particularly as the defendant, since the sale by *Ross* to the plaintiff, had frequently acknowledged that the timber belonged to the plaintiff. The Jury accordingly found a verdict for the plaintiff, leave being reserved to the defendant to move to set it aside, and that a new trial might be had, in case the Court should be of opinion that the plaintiff, under the above circumstances, was not in a situation to maintain this action.

Mr. Serjeant *Taddy*, in the last term, accordingly obtained a rule *nisi*, and submitted, that although it might be insisted that the defendant, in his character of wharfinger, cannot set up the title of a third person, after he had told the plaintiff that he would hold the timber for him, yet that will

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not apply to an action of trover, where the only question is, in whom the property of the article alleged to be converted is vested. Here, the timber had not only been sold by *Ross* to *Allum* a month before the re-sale to the plaintiff; but *Allum* had marked the whole of it with his initial, and made two payments on account. The property in the timber was therefore clearly in him; and although the defendant might be responsible to the plaintiff in an action of *assumpsit*, for not holding the timber for him according to his undertaking, yet he could not, by his mere acknowledgments, divest *Allum* of his title to or property in the timber. In *Ogle v. Atkinson* (a), it was held, that a warehouseman receiving goods from a consignee, who has had actual possession of them, to be kept for his use, might, nevertheless, refuse to re-deliver them, if they were the property of another; and Lord Chief Justice *Gibbs* there said (b)—“This is an action by the plaintiff against the defendants, into whose hands the plaintiff had delivered goods, brought for the purpose of recovering from them the value of the goods, which they refuse to re-deliver, insisting that the property of the goods is in *Smidt & Co.*, from whom they have had notice to detain them. There are two preliminary points made by the plaintiffs—*first*, that the defendants cannot refuse to deliver up the goods to the plaintiff, from whom they received them: but if the property is in others, I think they may set up this defence;—*secondly*, it is said the plaintiff has a lien for freight.” There, too, the action was trover, and the Court decided in favour of the plaintiff on the second point only.

Mr. Serjeant *Wilde* now shewed cause.—The plaintiff purchased the timber from *Ross*, which was then lying on the defendant's wharf; and when goods are deposited in a

(a) 5 Taunt. 759; S. C. 1 Marsh. 323.

(b) 5 Taunt. 762; S. C. 1 Marsh. 331.

warehouse, or on a wharf, the law considers them as if they are in the manual possession or custody of the seller. The plaintiff bought the timber in the ordinary course of trade, and, on the production of *Ross's* order, the defendant said that he would hold the timber for the plaintiff, instead of informing him that *Allum* had a property in it. The defendant, therefore, is estopped by his own act from saying that the timber is not the property of the plaintiff. Besides, the defendant afterwards sent the plaintiff a bill for wharfage and other dues, and said that they were the only charges on his (the plaintiff's) timber. As, therefore, the defendant induced the plaintiff to believe that the timber was his, he cannot now say that it was not; and as he claims to hold it for another, he has been guilty of a conversion. In *Herman v. Anderson* (a), where, with the privity of the vendor, a wharfinger, who had the custody of goods, charged the vendee with warehouse rent, it was determined that he held them for the vendee, and that they were no longer subject to stoppage *in transitu*, and further, that if the vendee received from the vendor an order for the delivery, which he lodged with the wharfinger, it would produce the same effect, although no transfer was made in the wharfinger's books. In *Lucas v. Dorrien* (b), it was held, that the indorsement and delivery of *West India Dock* warrants was a sufficient transfer of goods deposited in the warehouses of the Company, and that it was not necessary that the transfer should be actually made in their books. Although, in *Ogle v. Atkinson*, Lord Chief Justice *Gibbs* is reported to have said, that if the property of goods is in a third person, a warehouseman may set it up as matter of defence; and Mr. Justice *Heath* said (c)—“It is peculiar to the action of ejectment, that he who is entrusted with the possession of land, must deliver it back

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(a) 2 Camp. 243.

Taunt. 278.

(b) 1 B. Moore, 29; S. C. 7

(c) 5 Taunt. 764.

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to his lessor; but that rule extends to no other action:" yet these *dicta* must be considered as extrajudicial, and expressed in too large and unqualified terms, particularly as the decision of the Court turned entirely upon another point, *viz.* that there was a complete delivery to the plaintiff's agent, which vested the property absolutely in the plaintiff, as no condition was imposed at the time of such delivery. In *Barton v. Boddington (a)*, where the vendor of tallow in the warehouses of the *London Dock Company*, sold the tallow, and gave an order addressed to the Company, directing them to weigh, deliver, transfer, or re-house the tallow, to Messrs. *M. & B.*; the order being received at the Docks, and *M. & B.* having sold the tallow, and received the money for it, it was held that the original vendor could not stop the tallow in the hands of the Company, although it had not been weighed. And in *Hawes v. Watson (b)* where *A.* by contract sold a quantity of tallow to *B.*, then lying at a wharf, at so much *per cwt.*; and on the same day gave a written order upon the wharfingers, to weigh, deliver, transfer, and re-house the same, and *B.*, having entered into a contract to sell tallow to *C.*, obtained from the wharfingers and gave to *C.* a written acknowledgment that they had transferred the tallow to *C.*'s account, and that he was to be liable to charges from a given date:—*B.* having stopped payment, *A.* gave notice to the wharfingers not to deliver the tallow to *B.*'s order; and it was held, in trover by *C.* against the wharfingers, that, after their acknowledgment, they held the tallow as the agents of *C.*; and, therefore, that they could not set up as a defence a right in *A.* to stop it *in transitu*. These cases, therefore, and particularly the latter, have established the principle, that where a wharfinger has acknowledged that he holds goods as the agent of a particular person, he is estopped from disputing the title of the latter, or set-

(a) 1 Car. & Payne, 207.

(b) 2 Barn. & Cress. 540; S. C. 4 Dow. & Ryl. 22.

ting up the claim of another, in an action of trover brought by his principal.

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Mr. Serjeant *Taddy* in support of his rule.—The main point is, whether the acknowledgments made by the defendant, that the timber is the property of the plaintiff, are conclusive and binding on the defendant. It must be considered that this is an action of trover, in which the only question is, whether the plaintiff has shewn that the legal right of possession or property in the timber is in himself. If it be in a third person, it is quite clear the plaintiff cannot be entitled to recover, and there can be no doubt, from the evidence adduced at the trial, but that the property in the timber is in *Allum*, the original purchaser, as he marked it with his initial, and made two payments on account. The cases which have been cited for the plaintiff are divisible into two classes. In *Lucas v. Dorrien*, the dock warrants were the lock and key to the property, and therefore the transfer of the warrants by indorsement was deemed equivalent to a transfer of the goods, because a symbolical delivery may be considered as tantamount to an absolute delivery. So, in *Zwinger v. Samuda* (a), it was held that the warrants were equally negotiable as bills of lading, and that, when indorsed for a *bona fide* consideration, they were to be deemed equivalent to a delivery of the property in the Company's warehouses; for, as Mr. Justice *Park* said (b)—“because the plaintiffs cannot have an actual delivery of the coffees, they take a symbolical delivery.” Here, however, there was no such transfer or delivery. In *Harman v. Anderson* the question turned entirely on the doctrine of stoppage *in transitu*; besides, there, the wharfinger was considered the common agent of both the vendor and the vendee; and it was therefore held, that where the purchaser gave an order to the wharf-

(a) 1 B. Moore, 12.

(b) *Ib.* 18.

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inger to deliver goods, and he transferred them in his books into the name of the purchaser, the vendor's right to stop them *in transitu* was gone; and Lord *Ellenborough* said—"after the note was delivered to the wharfingers, they were bound to hold the goods on account of the purchaser. The delivery note was sufficient, without any actual transfer being made in their books." The case of *Hawes v. Watson* was peculiar in its circumstances; and Mr. Justice *Bayley* said (a)—"when Messrs. *Raikes & Co.* signed the order to transfer, weigh, and deliver, that, according to the settled course and usage of trade, enabled *Moberley & Bell* to sell the goods again." That is the ground upon which that case was decided; for the original owner of the tallow, by his order, enabled the first vendee to sell, and he entered into a contract accordingly, and the vendor sanctioned the transfer to the person to whom he sold. Here, however, *Allum* took no part in the contract or sale as between the plaintiff and *Ross*; and the defendant, as a wharfinger, could convey no title, nor alter the situation of the parties. In *Barton v. Boddington*, the original vendor gave the usual transfer order, and the party to whom the tallow was transferred having sold it and received the money for it, it was held that the first vendor could not stop it; for, as Lord Chief Justice *Abbott* said—"although the first seller has not been paid, yet, as the subsequent buyer has *bond fide* paid the person he bought of, the first seller cannot call on the Dock Company to deliver the goods to him." The reason is, that he was precluded by his own act, *vis.* by signing the delivery note, by which he created a title in the person to whom he sold. Here, however, the question of stoppage *in transitu* does not arise, and as there are, in fact, two vendees, and *Allum* has the prior title, and has given no order to the defendant to deliver the timber, he cannot be liable to the plaintiff in this action,

(a) 2 Barn. & Cress. 543.

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although he might be responsible in *assumpsit* for a breach of his undertaking to hold the timber for him. The case of *Dixon v. Hamond* (a) is an authority to shew the distinction between *assumpsit* and *trover*. There, the action was for money had and received, and Lord Chief Justice *Abbott* said—"if, in order to maintain this action, it were necessary to shew that the legal title to the ship was in the plaintiff, there can be no doubt that the defendant would be entitled to our judgment. In truth, the legal title to the ship has nothing to do with this question." Here, however, the plaintiff can only recover on his legal title, which he has not shewn to be in him; and his claim ought not to affect *Allum's* prior right. The case of *Ogle v. Atkinson* is precisely in point; and no Judge was better acquainted with commercial law than Lord Chief Justice *Gibbs*, who said, that if the property is in others, it may be set up as a defence in an action by the party who delivered the goods to the warehouseman. Here, then, the only question is, who has the legal right of possession of the timber? It clearly belongs to *Allum*, the first purchaser, although the defendant has admitted that it was the property of the plaintiff.

Lord Chief Justice TINDAL.—It appears to me to be unnecessary, in deciding this case, to consider more than one point, to which I shall confine myself; and therefore I shall not attempt to follow or comment on the several questions which have been raised in the course of the argument, or to pursue narrowly the accuracy or bearing of the decided cases to which we have been referred. This is an action of *trover* for the recovery of certain timber, alleged by the plaintiff to be his property, and to have been converted by the defendant. I agree that the only question is, whether the plaintiff can shew the property to

(a) 2 Barn. & Ald. 310.

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be in himself, and that the defendant has been guilty of a conversion? For the plaintiff, it has been contended, that he has sufficiently shewn the property to be in him, and that the defendant is estopped from disputing it, by his own acts and admissions; and, therefore, that he is barred from setting up the title of a third person. Now, if the defendant's admissions do not amount to an estoppel, the doctrine on that subject may be at once blotted out of our books. It was proved, that, on the 7th *November*, the plaintiff purchased the timber of one *Ross*, who, on the same day, gave a written order to the defendant to deliver it to the plaintiff upon receiving a sum due for the cartage. The defendant, upon receiving the order and that sum from the plaintiff, complied with the terms of the order, and said that he would hold the timber for him; and, on a subsequent occasion, he told some sawyers who were in his employ, that the timber belonged to the plaintiff; and, ultimately, *vis.* on the 24th *December*, he sent the plaintiff a bill for wharfage, and said, "I am not aware that there are any other charges on *your* timber." The only question then is, whether, after those admissions, the defendant can set up a title in a third person? It must be recollected, that, at the time he made them, he was not ignorant of *Allum's* claim. The plaintiff, from the expressions used by the defendant, was induced to suppose that the latter kept the timber for him, as it was treated 'as his property. But it has been said, that the case of *Hawes v. Watson* bears a near resemblance to the present, where it was held, that, after an acknowledgment by the defendants, who were wharfingers, that they had transferred goods to the account of the plaintiffs, the defendants held the goods as the plaintiffs' agents, and that they could not set up as a defence, a right in a third person to stop them *in transitu*. But the doctrine of stoppage *in transitu* does not apply to the principle of an estoppel, which does not vary according to the rights of rival claimants. Here, no direct

admission by the defendant in writing was necessary. The plaintiff acted on his representations; and his acts and words place him out of Court, as much as if he had made a direct admission in Court. It is, therefore, unnecessary for me to consider whether the property of the timber is in *Allum*, although, from the evidence, I am far from being satisfied that it is. This rule, therefore, must be discharged.

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Mr. Justice PARK.—It is not necessary for us to apply the doctrine of stoppage *in transitu* to this case, or to decide in whom the property in the timber is vested, or whether the defendant may not be liable to an action at the suit of *Allum*, as I rely on the three several acknowledgments by the defendant, made at three different intervals, that the timber was the property of the plaintiff. Upon receiving the order from *Ross*, the defendant said to the plaintiff, "Very well, I will hold the timber for you," and he never made any mention of *Allum*; it would be a gross fraud on the plaintiff, if, after that, it should be held that he was not entitled to recover. But, upon another occasion, the defendant told his sawyers, that the timber belonged to the plaintiff; and, ultimately, when he made inquiry as to the charges respecting it, the defendant delivered a bill for wharfage, and said, "I am not aware that there are any other charges on *your* timber." This brings me to the case of *Hawes v. Watson*, which appears to be expressly in point. There, the plaintiffs purchased by contract of *Moberley & Bell* three hundred casks of tallow. Two days afterwards, in part execution of their contract, they sent the plaintiffs a transfer note, signed by the defendants, who were wharfingers, as follows:—"Messrs. *Hawes*, we have this day transferred to your account (by virtue of an order from Messrs. *Moberley & Bell*) one hundred casks of tallow, *ex Matilda*, with charges"—this the Court considered amounted to an acknowledgment by the defendants, that they

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held the tallow as the agents of the plaintiffs; and Lord Chief Justice *Abbott* said, "the plaintiffs, in this case, paid their money upon the faith of the transfer note, signed by the defendants, by which they acknowledged that they held the tallow as their agents. If we were now to hold, that, notwithstanding that acknowledgment and that payment, the plaintiffs are not entitled to recover, we should enable the defendants to cause an innocent man to lose his money. To hold that the doctrine of stoppage *in transitu* applied to such a case as the present, would have the effect of putting an end to a very large portion of the commerce of the city of *London*." And Mr. Justice *Holroyd* said, "I think that the note given by the defendants makes an end of the present question. When that note was given, the tallow became the property of the plaintiffs, and is to be considered from that time as kept by the defendants as the agents of the plaintiffs; and the latter were to be liable for all charges; the wharfingers, upon the receipt of the order directing them to weigh and deliver, sent an acknowledgment that they, the wharfingers, had transferred the goods to the vendees, and that they would be considered as subject to charges from a certain period." And Mr. Justice *Best* said, "I am also of opinion, that the acknowledgment which has been given in evidence, puts an end to all question in this case." That case is decisive as to the principle by which this must be governed:—in *Harman v. Anderson*, Lord *Ellenborough* used very strong language; and, in the subsequent case of *Stonard v. Dunkin (a)*, where a warehouseman, who, on receiving an order from the seller of malt, to hold it on account of the purchaser, gave a written acknowledgment that he so held it, Lord *Ellenborough* said,—"whatever the rule may be between buyer and seller, it is clear the defendants cannot say to the plaintiff—'the malt is not yours,' after acknowledging to hold it on his

account. By so doing, they attorned to him." The case of *Ogle v. Atkinson* does not apply to the present, as there, the question turned chiefly upon the delivery of the goods to the plaintiff's agent, which the Court considered to be complete, and decided for the plaintiff accordingly. On the whole, therefore, and for the reasons stated by my Lord Chief Justice, I think there is no ground to disturb the verdict which the plaintiff has obtained, or to grant a new trial.

Mr. Justice BOSANQUET.—I am also of opinion that the plaintiff is entitled to recover; and if we were to hold otherwise, we should destroy the principle by which a large portion of the trade of the city of *London* is regulated; viz. that if a wharfinger acknowledges that he holds goods on account of a certain individual, he cannot afterwards dispute his title to them; and it is immaterial whether the acknowledgment be by parol, or in writing. In questions between vendor and vendee, the bill of lading, or bought and sold note, or other symbol of property, may be material, but a distinction has always been made in respect to a wharfinger; and although the doctrine of attornment does not in strictness apply to personal property, yet the principle was clearly laid down by Lord *Ellenborough* in the case of *Stonard v. Dunkin*, to which my brother *Park* has referred us. But, independently of this, the case of *Hawes v. Watson* appears to me to be decisive of the question. That was an action of trover for tallow; and Lord Chief Justice *Abbott* was of opinion at the trial, that whatever the question might be as between buyer and seller, the defendants, having by their note acknowledged that they held the tallow on account of the plaintiffs, could not afterwards dispute their title; and he did not afterwards recede from that opinion, for, after argument on a motion for a new trial, his Lordship said—"if we were now to hold, that, notwithstanding that acknowledgment and that payment, the plaintiffs are not entitled to recover, we should enable

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the defendants to cause an innocent man to lose his money;" and Mr. Justice *Holroyd* said—"I think that the wharfingers held the tallow as the goods of the plaintiffs, and as their agents, although there was not any actual weighing of them; and that the plaintiffs were then in possession by the defendants as their agents, they having acknowledged themselves as such by their note." In *Hawes v. Watson*, the title set up was that of *Raikes & Co.*, the original vendors of the tallow, and it was insisted that they had a right to stop it *in transitu*, as it had not been weighed; and, in a subsequent case, the *London Dock Company* were placed in the same situation as the defendant *Watson*. The Company delivered up the goods, and *Raikes & Co.* brought an action against them, insisting that they were entitled to claim the tallows, and to recover from the Company, as they had been delivered before they were weighed; or, at all events, that they had a right to stop them *in transitu*, until they had been weighed. But the Court thought that they had no such right. Independently of that, however, the cases of *Hawes v. Watson*, and *Stonard v. Dunkin*, have established the principle, that whatever may be the right or claim of a third person, a wharfinger cannot set it up after he has acknowledged that the title is in another; and here, there was evidence of frequent acknowledgments by the defendant, that the timber in question was the property of the plaintiff.

Mr. Justice ALDERSON.—I entirely concur with the rest of the Court. The defendant repeatedly acknowledged that the timber was the plaintiff's, he at the same time having a full knowledge of *Allum's* claim. He therefore ought not to be allowed to dispute the plaintiff's title, after having admitted that the timber belonged to the plaintiff.

Rule discharged.

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DOE, on the Demise of BARRETT, v. KEMP.

THIS was an action of ejectment, and brought to recover two cottages, situate in the parish of *Gissing*, in the county of *Norfolk*, to which the plaintiff claimed to be entitled as mortgagee of one *Lingford*. The demise in the declaration was laid on the 3rd *April*, 1828.

At the trial, before Mr. Justice *Littledale*, at the last Assizes at *Norwich*, it appeared that, in 1805, one *Lingford* inclosed a portion of green sward, or slip of waste land, lying between the high road and an old inclosure in the parish of *Gissing* belonging to Lord *Orford*. That *Lingford* built a cottage on the land, and afterwards mortgaged the whole to *Barrett*, the father of the lessor of the plaintiff, who devised it to him by will; and that, in 1815, *Lingford* built a second cottage on the same slip. It was also proved that the road or highway was skirted on both sides by slips of green sward or waste land, from the inclosed slip on which the cottages were built, for several hundred yards, up to a bridge, where the old inclosures converged to the sides of the road, and the green swards terminated in a point. That, a few yards beyond the bridge, the fences of the old inclosures again receded, and the road was afterwards skirted by slips of green sward or waste land, which ultimately terminated in an extensive common. That, with the exception of the piece of inclosed land belonging to Lord *Orford*, between which and the high road the cottages in question were built, the old inclosed land on both sides of the road, from the cottages to within a few yards of the bridge, belonged to the defendant as lord of the manor of *Gissing*; and that, beyond the bridge, the old inclosed land on both sides the road belonged to different proprietors of land in that parish. It also appeared, that, in 1819, *Lingford* became insane; and that he was taken to a lunatic asylum, where he died. The de-

In ejectment, the question was, whether a slip of land between some ancient inclosures and the highway belonged to the owner of the adjoining freehold, or to the lord of the manor:—*Held*, that acts of ownership by the lord, over slips similarly situated within the manor, were admissible in evidence, although such slips did not adjoin his own freehold; and such evidence having been rejected, the Court granted a new trial.

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defendant, as lord of the manor, claimed the land on which the cottages stood, and received the rent of them from the occupiers, from the death of *Lingford*, until 1828, when the present action was commenced.

The defendant, in support of his claim, proved, by several witnesses, that he had exercised various acts of ownership for several years on the green swards or slips of waste land by the side of the road from the cottages in question up to the bridge, and that he had inclosed several parts of those slips. His counsel then proposed to call witnesses, to shew that the defendant had exercised similar acts of ownership on the slips of waste beyond the bridge, and in various other parts of the manor. The learned Judge however refused to receive evidence of any acts of ownership beyond the bridge, as it appeared that the inclosed lands on the other side adjoining the road belonged to various other persons, and the defendant's manor only extended to the bridge, where there was a breach of continuity. Conflicting evidence was then given of acts of ownership over the *locus in quo* by Lord *Orford*, and those persons under whom the lessor of the plaintiff claimed. The Jury, after the summing up of the whole of the evidence, found a verdict for the plaintiff.

Mr. Serjeant *Wilde*, in the last term, obtained a rule *nisi* that this verdict might be set aside, and a new trial had, on the grounds that the verdict was against evidence, and that evidence offered by the defendant had been rejected, which ought to have been received, as he claimed as lord of the manor, and proved that the slip of land on which the cottages stood was formerly part of the waste.

Mr. Serjeant *Jones* now shewed cause.—The evidence offered by the defendant as to acts of ownership on the other side of the bridge was properly rejected, as it did

not appear that he was the owner of any inclosed lands adjoining the highway beyond the bridge. Although it may be admitted, that if lands be held all under one general title throughout one certain district, acts of ownership in different parts may be received as evidence of the same right throughout the whole; yet, here, the defendant offered no evidence to connect the slips of waste, which skirted the lands of other proprietors on the other side of the bridge, with the slips which skirted his own land from the cottages up to the bridge. In *Stanley v. White* (a), where, in an action of trespass for cutting down the plaintiff's trees, the defendant pleaded his soil and freehold in the close, upon which the trees grew; and the plaintiff replied, that the trees were his trees and freehold; and it appeared, on the trial, that the trees grew in a woody belt, of considerable extent, entire and undivided, which encircled the plaintiff's manor, and lay contiguous to a number of closes belonging to several owners, one of which closes was that of the defendant; and evidence was admitted of several acts of ownership, in different parts of the belt, by those under whom the plaintiff claimed, which had been acquiesced in by the owners of the adjoining land:—although the Court of *King's Bench* held that the evidence was properly admitted, as evidence of the general right through the whole extent of the inclosure, yet the plaintiff gave preliminary evidence that his manor was surrounded on all sides by a belt of land, within which the trees in question had been cut. In *Tyrwhitt v. Wynne* (b), where, in trespass, the issue was, whether certain common land was the soil and freehold of the lord of the manor, or the soil and freehold of the plaintiff; it was held, that leases of minerals, &c., granted by the lord to other persons in other parts of the uninclosed waste land, were not receivable in evidence, unless it were first shewn that the

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(a) 14 East, 332.

(b) 2 Barn. & Ald. 554.

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locus in quo formed part of one entire waste, to which those leases were applicable; and Mr. Justice *Bayley* there said (a)—“when once it has been established that the *locus in quo* is part of one entire district, honor, or manor, it is competent to give in evidence acts done on other parts of that district, honor, or manor, in order to shew a right to the *locus in quo*. But, here, that preliminary proof was not given.” So, in this case, the defendant offered no preliminary evidence to shew that his manor extended to the other side of the bridge; on the contrary, it appeared that his lands extended no further than the bridge. The learned Judge therefore properly thought that the continuity was broken at that point. In *Hollis v. Goldfinch*, Mr. Justice *Bayley* said (b)—“in all those cases where evidence of acts done in one spot have been held admissible, in order to shew a right in another, a reasonable probability has been previously made out, that the whole land had been formerly in one owner, and had been all subject to one and the same burden.” Here, however, it appeared that the inclosed lands on both sides of the road, on the other side of the bridge, did not belong to the defendant, but to various other persons. Besides, the presumption is, that waste land, which adjoins to a road, belongs to the owner of the adjoining inclosed land, whether he be a freeholder, leaseholder, or copyholder, and not to the lord of the manor. *Doe d. Pring v. Pearsey* (c). In this case, the slip of land on which the cottages were built, lay between the high road and an old inclosure belonging to Lord *Orford*. It may therefore be presumed that the waste once belonged to him; and as the plaintiff did not prove that he had made any inclosures as the lord of the manor, but merely as the owner of the adjoining lands, the verdict is against evidence, and the defendant is entitled to a new trial.

(a) 2 Barn. & Ald. 561.

(c) 7 Barn. & Cress. 304; S. C.

(b) 1 Barn. & Cress. 218; S. C. 9 Dow. & Ryl. 908.

2 Dow. & Ryl. 329.

Mr. Serjeant *Wilde*, (and Mr. Serjeant *Bompas* was with him), were stopped by the Court.

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Lord Chief Justice TINDAL.—The only question for our consideration is, whether the evidence tendered by the defendant was improperly rejected by the Judge at the trial. On the best consideration I can give the point, I think the rejection was premature. I offer no opinion upon the effect of the evidence if it had been received, but, such as it was, it ought to have been submitted to the consideration of the Jury. The contest was respecting the right to a small slip of land between some old inclosures and the highway; and the question was in whom it was vested, *viz.* whether in Lord *Orford*, the owner of the adjoining freehold, or in the defendant as lord of the manor of *Gissing*. It is well known that all inclosures of waste lands are supposed to have been derived originally from grants of the lords of manors, as the grants to the lords are said to have come from the Crown. The question then is, whether *Lingford*, the grantee, carried the inclosure to the edge or extremity of his grant, or left a space or interval between his inclosure and the boundary line of his grant. If he omitted to inclose the whole extent of his grant, the slip of land in dispute belongs to Lord *Orford*, as the owner of the adjoining freehold; but if *Lingford* inclosed to the extent of his grant, the slip in question belongs to the defendant as lord of the manor. It seems that the legal presumption was originally, and still continues, in favour of the grantees of the adjoining land, for, when the lord of a manor claims the interval or waste, it is generally incumbent on him to shew that he has exercised acts of ownership over it, in order to support his claim. That is the usual and ordinary evidence. The question then is, whether evidence of that nature is to be confined to a given spot, or whether it may not be extended to acts of ownership exercised over similar lands, within and forming part of the same

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manor? It seems to me that such extended evidence is admissible; and that the defendant, as lord of the manor, has brought himself within the rule established by the case of *Stanley v. White*, where proof of a general right over one entire district was admitted, to explain and affect the rights of different persons in different parts. So, where the land is all within the same manor, and the question is, whether certain uninclosed slips were included in the original grant, and the locality and the circumstances are the same, I see no reason why evidence of acts of ownership over one part of such land should be excluded on a question of title as to another part. It is well known that, in questions as to a right of common, evidence of feeding cattle on any part of the common may be given, and the party is not to be confined to one particular spot or part of the common. A feeding on one part of the common may be evidence as to a right to feed on the whole of the common. But inclosure is a much stronger act of ownership than feeding cattle; why then might not the lord adduce evidence to shew that he had inclosed other slips or open places within and forming part of the same manor? Suppose the original grant were lost, yet, as it must be assumed that the whole of the manor was granted in the first instance to the lord, why may he not shew what rights he has been allowed to exercise, with the consent of subsequent grantees, on other parts of the same manor, adjoining the *locus in quo*, as well as on the slip in question. If we were to reject such evidence in the outset, although the lord might be prepared to shew that he had uniformly inclosed frontages or slips of this description in every other part of the manor, yet he might lose the slip in question, if the assertion of his right there had been accidentally omitted. Here, evidence of inclosures made by the defendant, of slips similarly situated to that in dispute, was admitted up to a certain limit, but beyond that limit it was rejected as to other places, although they are within the

same manor. On the whole, therefore, I think that such evidence was admissible, and ought to have been left to the consideration of the Jury; but, as it was rejected—without saying what its effect might be, I think the rule for a new trial ought to be made absolute.

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Mr. Justice PARK.—It will be useless for me to take up the time of the Court, as I fully concur with my Lord Chief Justice in all the reasons he has stated for sending this case down to another trial. I do not pretend to say what the result may be, or what effect the evidence when produced may have on the minds of the Jury; but, as it was excluded from their view, I concur in thinking that this rule ought to be made absolute.

Mr. Justice BOSANQUET.—I am also of opinion that this rule should be made absolute. Where evidence is offered of acts of ownership in other parts of a manor than the *locus in quo*, it is for the Judge to decide, in the first instance, whether there is such an unity of character in the different parts of the manor belonging to the same lord, as to render evidence affecting a part not in dispute admissible with reference to the part in contest, and whether the acts relied on amount to evidence of ownership. It appears to me that this case satisfies both these conditions. What are the facts? There is a slip of waste land adjoining the land of the lord of the manor of *Gissing*; there are interruptions of the slip for a few yards, and then a renewal of it, adjoining the lands of strangers; but the circumstance, that all the slips are within the same manor, gives them a general unity of character, which has not been shewn to have been destroyed. The evidence as to acts of ownership or inclosure by the lord over all the parts of the waste may not be of the same force, or have been exercised under the same circumstances; but whether there was a general unity of character as to all the different parts of the manor, was a

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question for the consideration of the Jury. All the waste or slips of land no doubt once formed part of the same manor, and originally belonged to the lord; and when he granted parts to others, whether the grantees had inclosed the whole of such parts, was also a question for the Jury. It appears to me, that acts of inclosure by the lord in different parts of the waste adjoining the property of strangers, afford more cogent evidence of his title to the slips of waste than acts of a similar kind in parts immediately adjoining his own land. But this was a question for the Jury and not for the Court; and I think the learned Judge, having admitted the preliminary evidence, improperly rejected the acts of ownership exercised by the defendant on the other side of the bridge.

Mr. Justice ALDERSON.—I am also of opinion that the evidence which was rejected ought to have been received. But, as it was not produced, it is impossible to say to what extent it might have gone. It might have been cogent or weak. The Court is not easily induced to grant a new trial, on the ground that the verdict is against the weight of evidence. So, where evidence has been rejected which ought to have been received, if we could clearly see, that, if it had been admitted, the result would have been the same, we might not require a further investigation. The question, whether the defendant as lord of the manor had a right to the slip in question, would depend in a great measure on similar acts of ownership exercised by him on other parts of the same manor, where he had directed inclosures to be made; and as evidence was admitted as to acts of ownership by the defendant on certain waste lands up to a particular spot, I think that evidence of similar acts of ownership beyond that spot ought to have been received, provided they had been exercised within a part of the same manor. The rule for a new trial must therefore be made—

Absolute.

7 King. 346.

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Saturday,
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DOZ, on the Demise of HARDING, v. COOKE.

THIS was an action of ejectment, and brought to recover a messuage and ten acres of land, situate in the parish of *Georgeham*, in the county of *Devon*. At the trial, before Mr. Baron *Vaughan*, at the last Assizes at *Exeter*, the lessor of the plaintiff proved, that his father had let the premises by lease to one *Williams*, for the term of fourteen years; viz., from *Lady-day*, 1797, to *Lady-day*, 1811; and that, during that period, *Williams* regularly paid his rent to *Harding* the elder; and that the lessor of the plaintiff let the premises, in 1816, to Messrs. *Barnes*, at an increased yearly rent, which they paid him until 1819. The defendant proved that he had been in possession of the premises from the year 1819, but no evidence was given as to the possession or occupation from 1811 to 1816, nor was it shewn that the lessor of the plaintiff was the heir or devisee of his father, or that he had any other son. The sole ground of defence was the possession by the defendant from the year 1819, to the time of the commencement of this action. The learned Baron left it to the Jury to say, whether there was evidence from which they might infer a title in the lessor of the plaintiff? They found in the affirmative, and gave a verdict for the plaintiff accordingly.

In ejectment, the lessor of the plaintiff proved, that he and his father were possessed of the premises sought to be recovered for twenty-three years, and received the rent during that period, and that his father died seised. The defendant relied on a possession of ten years succeeding the twenty-three: — *Held*, that the earlier possession by the lessor of the plaintiff must prevail, and that he was entitled to recover, unless the defendant shewed that he had a better title.

Mr. Serjeant *Wilde*, in the last term, obtained a rule nisi that this verdict might be set aside and a new trial had, on the ground that the lessor of the plaintiff could only recover on the strength of his own title, and that he had not shewn a sufficient title as against the defendant, who had been in the uninterrupted possession of the premises for more than ten years past; neither did the plaintiff prove who was in the possession or occupation from 1811 to 1816.

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Mr. Serjeant *Jones* now shewed cause.—As the lessor of the plaintiff proved, that he and his father had let the premises in question and received the rent from 1797 to 1819, it was sufficient to warrant the Jury in finding a verdict for the plaintiff, because twenty years' possession gives a *prima facie* title in ejectment, either for the plaintiff or the defendant. In *Stokes v. Berry* (a), Lord *Holt* ruled, that if *A.* has had possession of lands for twenty years without interruption, and then *B.* gets possession, upon which *A.* is put to his ejectment, though *A.* is plaintiff, yet the possession of twenty years shall be a good title in him, as if he had still been in possession; and the same point had been previously ruled by his Lordship; because a possession for twenty years is like a descent, which tolls entry, and gives a right of possession, which is sufficient to maintain an ejectment. In *Denn d. Tarxwell v. Barnard*, Lord *Mansfield* said (b)—“The defendant has not attempted to shew any title, or that any one else was in possession before. It rests therefore in presumption, and consequently was matter proper for the consideration of the Jury. If no other title appears, a clear possession of twenty years is evidence of a fee.” Here, it was proved that the lessor of the plaintiff and his father were in possession of the premises, and received the rent for twenty-three years, whilst the defendant shewed no title in himself, but relied on the bare circumstance of possession from the year 1819; and in *Doe d. Hughes v. Dyeball* (c), it was held, that prior possession, however short, is a sufficient *prima facie* title in ejectment against a mere wrong-doer. In that case, the defendant forcibly took possession of a room, and the plaintiff rested his case on proving a lease of the house to him, and a year's possession; and on its being objected for the defendant that no title was proved in the demising parties

(a) 2 Salk. 421; S. C. *nomine*
Stocker v. Berny, 1 Ld. Raym. 741.

(b) Cowp. 597.

(c) 1 Mood. & Malk. 346.

to the lease, Lord *Tenterden* said, "that does not signify; there is ample proof; the plaintiff is in possession, and you come and turn him out: you must shew your title."

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Mr. Serjeant *Wilde* in support of his rule.—The defendant has been in the actual and uninterrupted possession and enjoyment of the premises for the last twelve years; that is a good *prima facie* title as against the preceding twenty-three years the plaintiff and his father had let them and received the rent. In *Goodtitle d. Parker v. Baldwin*, Lord *Ellenborough* said (a)—"The lessor of the plaintiff must recover against the defendant by the strength of his own title, and not by the weakness of the defendant's title;" and here the plaintiff failed to prove who was in the possession of the premises from 1811 to 1816, or how the defendant obtained possession in 1819. In the cases referred to, the possession of the lessor of the plaintiff continued down to the time of the ouster. In *Stokes v. Berry*, the defendant entered on the plaintiff's immediate possession; here, however, he had not only quitted possession, but did not shew any reason for having so done, or why he allowed the defendant to occupy the premises without interruption for so long a period as twelve years. Besides, the plaintiff adduced no evidence to shew that his father died seised, or that he was his eldest son or heir-at-law. The defendant, therefore, was not bound to disclose his title, on mere proof by the plaintiff that he and his father had been in possession of the premises from 1797 to 1811, and from 1816 until 1819, when the defendant became possessed, and has remained in the undisturbed possession ever since.

Lord Chief Justice *TINDAL*.—It was proved at the trial, that the elder *Harding* and his son held the premises sought to be recovered by this action for twenty-three

(a) 11 East, 495.

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years, and that during that period they received and increased the rent. These were unequivocal acts of ownership, from which the law presumes a seisin in fee. The father died seised, and the lessor of the plaintiff is the only son who is shewn to have survived him. Indeed, it did not appear that he had ever had any other son. That would be sufficient evidence even in a writ of right to call upon the tenant to shew and prove his title. It is admitted on the part of the defendant, that this proof would have been sufficient, if the action had been brought within a year or two after the lessor of the plaintiff had been out of possession. But if two years would not have preponderated against the lessor of the plaintiff, I see no reason why ten, or any period short of twenty years should raise a counter presumption. On the evidence given by the lessor of the plaintiff, it appears to me to have been sufficient to require the defendant to shew by what right he took possession, or under what authority he entered upon the premises. The lessor of the plaintiff might have been an infant, or out of the kingdom, at the time of the defendant's entry. He must know his title; and as the lessor of the plaintiff had the earlier possession, the presumption is, that the legal title is in him, until it be cut down by the defendant, or he shews that he has a better title than the plaintiff.

Mr. Justice PARK.—We shall impeach no rule of law by deciding this case in favour of the lessor of the plaintiff. He has shewn a strong presumptive title to the premises, arising out of twenty-three years' possession. The elder *Harding* and the lessor of the plaintiff received and increased the rent, and the defendant did not shew that the plaintiff was not *Harding's* eldest son. The defendant rests his title on a later possession of ten years, against the plaintiff's twenty-three years. This is presumption against presumption; but the lessor of the plaintiff proved sufficient to call upon the defendant to shew that he had a higher

or a better title. If the property had been sold to the defendant, he would have had no difficulty in proving the sale. Besides, no injustice will be done, because if the defendant still considers he has a good title, he may shew it in another action of ejectment.

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Mr. Justice BOSANQUET.—I am of the same opinion. The lessor of the plaintiff proved that his father and himself had received the rent; and that he had increased it since his father's death; and the defendant offered no evidence to shew that the plaintiff was not the son of the elder Harding.

Mr. Justice ALDERSON.—The defendant must either rely on a title in himself, or on the *jus tertii*; but he failed to shew either the one or the other; and if he still considers the title to be in himself, he has his remedy, as he may bring another action.

Rule discharged.

DAVIDSON v. NICOL.

Monday,
Jan. 31st.

THIS was an action on the case, and brought against the defendant, a factor, for alleged negligence in the disposal of certain of the plaintiff's goods, which he had undertaken to sell in *India*. The defendant, at his own expense, obtained a writ of *mandamus*, under the statute 13 Geo. 3, c. 63, s. 44 (a), for the examination of witnesses in that country; and the depositions having been returned and filed at the Secondaries' office, the plaintiff called there and de-

The defendant, at his own expense, obtained a writ of *mandamus* under the statute 13 Geo. 3, c. 63, s. 44, for examining witnesses in *India*. The depositions were returned, and filed at the Secondaries' office of this Court:—*Held*,

that the plaintiff was entitled to copies of them, on payment of the charges for making such copies, although he had not attended in Court in *India* either by his agent or counsel.

(a) See this section, *post*, p. 189.

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mandated copies, which he offered to pay for; but as he had declined to pay any part of the expenses attending the writ, the Secondary doubted whether he was entitled to the copies of the depositions. Whereupon—

Mr. Serjeant *Taddy*, on a former day in this term, obtained a rule *nisi*, that the Secondary might be restrained from issuing or giving copies of the depositions to the plaintiff. The learned Serjeant submitted, that as the plaintiff had refused to pay any part of the expenses attending the execution of the writ of *mandamus*, it was most unjust that he should be allowed to take copies of the depositions, and thus acquaint himself before the trial with the nature of the defence to the action. It might not be necessary for the defendant to use the depositions, and the Court will not compel him to furnish the plaintiff with his evidence, unless he discloses the nature of his own.

[Mr. Secondary *Griffith* stated, that, although the writ was issued on the application of the defendant alone, it was the practice to furnish copies of the interrogatories and depositions, when returned, to either party who required them, on payment of the costs of making such copies.]

Mr. Serjeant *Wilde* now shewed cause, and produced an affidavit of the plaintiff's attorney, who deposed that he had made inquiry at the Master's office of the Court of *King's Bench*, and was informed that it was the usual practice of that Court to furnish copies of the depositions to the plaintiff and defendant, in case they both required them, although the expenses attending the commission had been paid by one party alone. The plaintiff was not bound to concur or join in the application for the *mandamus* or commission. It was issued *ex parte*, and at the sole instance of the defendant; but, when it arrived in *India*, the plaintiff's agents or counsel might have cross-examined the defendant's witnesses; and when their ex-

amination or depositions were reduced into writing and returned to the proper officer of this Court, either party had a right to demand copies, on paying the officer his charge for furnishing such copies. When witnesses are examined on interrogatories, both the plaintiff and defendant are entitled to copies of the answers, although one has declined to pay any part of the expenses attending such examination. By the 40th section of the statute 63 Geo. 3, either the prosecutor or the defendant may obtain the writ of *mandamus* in a criminal proceeding; and in the case of *Grillard v. Hogue (a)*, the Court granted a *mandamus* to the Court in *India*, to examine witnesses on an application by *the defendant* in a civil action, under the 44th section of the statute.

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Mr. Serjeant *Taddy* in support of his rule.—The Court will restrain their officer from giving the plaintiff the copies of the depositions he requires, as the commission was issued at the sole expense of the defendant. Although the 40th and 44th sections of the statute may be incorporated and taken together, yet there is a wide distinction between a criminal and a civil proceeding; and, in this case, the plaintiff has never appeared, either by himself, or his agent or counsel, in the Court in *India*. He is, therefore, no party to the proceedings there; and the depositions have been returned under the seal of the Judges of that Court, and filed with the officer of this, as required by the 40th section of the statute. There is no decision to be found, which touches on this question; but the parties mentioned in the statute must be confined to those at whose suit the commission is sued out; and although duplicates of the examinations are to be delivered to the agents of the parties requiring them, yet, in this case, they ought not to be given to the plaintiff, as he refused to join in the commission; and as he did not cause the defendant's wit-

(a) 4 B. Moore 313; S. C. 1 Brod. & Bing. 519.

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nesses in *India* to be cross-examined in open Court there, he ought not to have the benefit of their testimony, to which the defendant alone is entitled, as the commission was procured, and the proceedings taken thereon, at his sole instance and expense.

Lord Chief Justice TINDAL.—The 40th section of the statute 18 *Geo.* 3, c. 63, relates to the manner of procedure, in cases of indictments and informations laid in the Court of *King's Bench*, for misdemeanors or offences committed in *India*. The 44th section applies to civil suits. It is necessary, in the first place, to look at the 40th section, which enacts, "that in all cases of indictments or informations, laid or exhibited in the Court of *King's Bench*, for misdemeanors or offences committed in *India*, it shall and may be lawful for his Majesty's said Court, upon motion to be made on behalf of the prosecutor, or of the defendant or defendants, to award a writ or writs of *mandamus*, requiring the Chief Justice and Judges of the Supreme Court of Judicature for the time being, or the Judges of the Mayor's Court at *Madras*, *Bombay*, or *Bencoolen*, as the case may require, who are thereby respectively authorized and required accordingly to hold a Court, with all convenient speed, for the examination of witnesses, and receiving other proofs concerning the matters charged in such indictments or informations respectively; and, in the meantime, to cause such public notice to be given of the holding the said Court, and to issue such summons or other process, as may be requisite for the attendance of witnesses, and of the agents or counsel of all or any of the parties respectively, and to adjourn, from time to time, as occasion may require; and such examination as aforesaid shall be then and there openly and publicly taken *videlicet* in the said Court, 'upon the respective oaths of witnesses, and the oaths of skilful interpreters, administered according to the forms of their se-

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veral religions; and shall, by some sworn officer of such Court, be reduced into one or more writing or writings on parchment, in case any duplicate or duplicates should be required by or on behalf of any of the parties interested, and shall be sent to his Majesty in his Court of *King's Bench*, closed up, and under the seals of two or more of the Judges of the said Court; and one or more of the said Judges shall deliver the same to the agent or agents of the party or parties requiring the same; which said agent or agents (or, in case of his or their death, the person into whose hands the same shall come,) shall deliver the same to one of the clerks in court of his Majesty's Court of *King's Bench*, in the public office, and make oath that he received the same from the hands of one or more of the Judges of such Court in *India*, (or, if such agent be dead, in what manner the same came into his hands), and that the same has not been opened, or altered, since he so received it, (which said oath such clerk in court is thereby authorized and required to administer); and such depositions being duly taken and returned, according to the true intent and meaning of the act, shall be allowed and read, and shall be deemed as good and competent evidence as if such witness had been present, and sworn and examined *vidæ voce* at any trial for such crimes or misdemeanors as aforesaid, in his Majesty's said Court of *King's Bench*, any law or usage to the contrary notwithstanding; and *all parties concerned* shall be entitled to take copies of such depositions at their own costs and charges."

The 44th section, after reciting that his Majesty's subjects are liable to be defeated of their several rights, titles, debts, dues, demands, or suits, for which they have cause arising in *India* against other subjects of his Majesty, for preventing such failure of justice, enacts, "That when and as often as the *East India* Company, or any person or persons whatsoever, shall commence and prosecute any action or suit, in law or equity, for which cause hath arisen,

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or shall hereafter arise in *India*, against any other person or persons whatever, in any of his Majesty's Courts at *Westminster*, it shall and may be lawful for such Court respectively, upon motion there to be made, to provide and award such writ or writs, in the nature of a *mandamus*, or commission, as aforesaid, to the Chief Justice and Judges of the said Supreme Court of Judicature for the time being, or the Judges of the Mayor's Court at *Madras*, *Bombay*, or *Bencoolen*, as the case may require, for the examination of witnesses, as aforesaid; and such examination, being duly returned, shall be allowed and read, and shall be deemed good and competent evidence, at any trial or hearing between the parties in such cause or action, in the same manner, in all respects, as if the several directions hereinbefore prescribed and enacted in that behalf were again repeated."

The only question then is, whether the latter part of the enactment in the 40th section, as to the taking copies of the depositions, is, by reference, virtually incorporated in the 44th; and I am of opinion that it is. In the first place, the 44th section says nothing of the examination of witnesses *vidæ voce* and in open Court in *India*, as directed in the 40th. But that privilege must be taken to extend to parties in civil suits, under the words in the latter part of the 44th section, *viz.* "in the same manner, in all respects, as if the several directions hereinbefore prescribed and enacted in that behalf were again repeated." Why then should not the same latitude of construction be given to the 44th section, as to the 40th, which entitles all parties concerned to take copies of depositions at their own costs and charges. This being a remedial statute, its object being the better management and regulation of the officers of the *East India* Company, should receive a liberal construction; and, in the case of *Grillard v. Hogue*, this Court held, that a defendant in a civil suit might apply for a *mandamus* under the 44th section of the statute,

as well as the plaintiff. Looking, therefore, at the object and language of the act, as well as the constant and uniform practice which appears to have prevailed since the statute was passed, I am of opinion that the plaintiff is entitled to have the copies of the depositions from the Secondary, on paying the costs attending the making of such copies.

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Mr. Justice PARK.—I fully agree with my Lord Chief Justice, that the 40th and 44th sections of the statute must be read and taken together, and that the same rule of construction is applicable to both. The 44th provides, that the examination being returned, shall be given in evidence, in the same manner as if the several directions before prescribed and enacted in that behalf were again repeated. In *Grillard v. Hogue*, we granted a *mandamus* at the instance of the defendant, although the 44th section only enumerates persons commencing and prosecuting actions or suits. The 40th section concludes by stating that “all parties concerned shall be entitled to take copies of depositions at their own costs and charges;” and it would be most absurd to construe those words as has been proposed, viz. by confining them to the parties applying for the *mandamus*, for the applicants do not require the copies. If we were so to determine, the words ‘all and every’ might equally be confined to one party. Besides, it appears to have been the constant and uniform practice of both the Courts, to grant copies to either of the parties who may require them; and that practice has never been questioned from the time the statute was passed, viz. in 1773, to the present day. That of itself appears to me to be conclusive to shew that the true and just construction has been put upon both the clauses of the statute.

Mr. Justice BOSANQUET.—I am of the same opinion. When the rule *nisi* was granted, our attention was not call-

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ed to the 40th section of the act; and I then thought that the plaintiff was not entitled to the copies of the depositions, as he took no part in obtaining them; but I now fully concur with my Lord Chief Justice and my brother *Park*, that the 44th section must be construed with reference to the 40th, which embraces *all parties concerned*, and directs that they shall be entitled to take copies of the depositions at their own costs; and it appears that the practice has been conformable to it, and prevailed universally, ever since the statute was passed.

Mr. Justice ALDERSON.—I am of the same opinion. The 40th section enacts, that it shall be lawful for the Court in *India* to issue such summons or other process as may be requisite for the attendance of witnesses, and of the agents or counsel of all or any of the parties respectively, and that the examination shall be openly and publicly taken *viâ voce*, in Court, and shall, by some sworn officer of such Court, be reduced into one or more writing or writings on parchment, in case any duplicate or duplicates should be required by or on behalf of any of the parties interested; and the clause concludes by stating, that all parties concerned shall be entitled to take copies of the depositions at their own expense; and the uniform practice which has ever since prevailed, appears to me to be in strict conformity with the statute.

Rule discharged; the costs of this application to be considered and taxed as costs in the cause (a).

(a) See *Whytt v. McIntosh*, 8 Barn. & Cress. 317; *S. C.* 2 Man. & Ryl. 133, where the defendant obtained a writ of *mandamus* under the forty-fourth section of the statute, and the plaintiff had a verdict, the Court of *King's Bench*

held, that he was entitled to his costs of cross-examining the witnesses in *India*.—But, in *Fairlie v. Parker*, 1 Moore & Payne, 438, where the plaintiffs had applied for and obtained such writ, which was returned, with the deposi-

tions, to this country, but the defendant did not join in the application for the writ, nor examine or cross-examine witnesses under it, and the plaintiffs obtained a

verdict; this Court held that they were not entitled to the costs attending the writ, or of the office copies of the depositions.

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FRANCES STANLY, Administratrix of THOMAS STANLY,
v. JOHN JONES.

Monday,
Jan. 31st.

THIS was an action of debt. The declaration stated, that heretofore, to wit, on the 9th *September*, 1824, at *Westminster*, in the county of *Middlesex*, by certain articles of agreement, then and there made between the defendant *John Jones*, administrator of the goods and chattels, rights and credits of *Thomas Jones*, late of *Bankside*, in the county of *Surry*, gentleman, deceased, of the one part; and *Thomas Stanly*, of the other part; one part of which said articles of agreement, sealed with the seal of the defendant, the plaintiff now brings here into Court, the date whereof is the day and year aforesaid, after reciting that the said *Thomas Jones* in his life-time carried on in partnership with *Robert Monro*, of *Nelson Square*, in the county of *Surry*, gentleman, and *William Seale Evans*, of *Twynning*, in the county of *Gloucester*, gentleman, the establishment of a gas-light concern at *Bank-side*, in the county of *Surry*; and that, after the decease of the said *Thomas Jones*, the defendant *John Jones*, as his administrator, succeeded in the place of the said *Thomas Jones*, in the said co-partnership concern; and that some time after, the said *John Jones*, through the representations of the said *Robert Monro* and *William Seale Evans*, that the said concern was not so productive and profitable as it really and truly was, was induced to relinquish his interest in the said co-partnership establishment, for a sum very far from equivalent to the value of such interest; and also reciting, that the

By articles of agreement, *T. S.* covenanted to communicate to the defendant all such information as he *T. S.* possessed or could procure, and to use and exert his utmost influence and means for procuring such evidence as should be requisite to substantiate the defendant's claims against *R. M.* and *W. S. E.*; in consideration of which, the defendant covenanted to pay *T. S.* one eighth part or share of such sum as should at any time be recovered or obtained, either by suit at law or in equity, from *R. M.* and *W. S. E.*:—*Held*, that the agreement was illegal, as it amounted to champerty.

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said *Thomas Stanly* had given the defendant reason to believe that the representations so made to him by the said *Robert Monro* and *William Seale Evans*, by which he was induced to relinquish his interest in the aforesaid co-partnership concern, were false; and that the said *Thomas Stanly* being in the possession of evidence to manifest the same, and to prove that the defendant was entitled to recover considerable sums of money from the said *Robert Monro* and *William Seale Evans* on account of the said co-partnership concern, had agreed to communicate such evidence to the defendant, upon receiving from him the sum of 23*l.* expended by him the said *Thomas Stanly* in obtaining the same, and upon having an agreement by the defendant to pay unto him the said *Thomas Stanly*, his executors or administrators, one eighth part of the clear amount of such sum or sums of money as the defendant should or might thereafter recover from the said *Robert Monro* and *William Seale Evans*, or either of them, through the means of the said *Thomas Stanly*, after payment of the expenses of recovering such moneys;—and also reciting, that the defendant had assented to such proposal, and had agreed to pay to the said *Thomas Stanly* the said sum of 23*l.*, and to enter into such covenant with the said *Thomas Stanly*, as in the said articles of agreement is contained and hereinafter mentioned:—the said articles of agreement witnessed, that, for carrying the said recited agreement into effect, and in consideration of the sum of 23*l.* by the defendant to the said *Thomas Stanly* paid as therein mentioned; and, in consideration also of the covenant therein contained on the part of the defendant, he the said *Thomas Stanly* did thereby, for himself, his heirs, executors, and administrators, covenant, promise, and agree, with and to the defendant, that he the said *Thomas Stanly* should and would, immediately after the execution of the said articles of agreement, communicate unto the defendant all such knowledge and information as he the said *Thomas*

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Stanly possessed, touching the falsehoods and misrepresentations made by the said *Robert Monro* and *William Seale Evans*, by which the defendant was so induced to quit the said partnership concern, as in the said articles of agreement was mentioned, and should and would give and communicate unto the defendant all such information as he the said *Thomas Stanly* possessed, or could or might procure or get at, with a view to the recovery by the defendant of all such sum and sums of money as the defendant, as such administrator of the said *Thomas Jones*, had been deprived of, or had lost, through the misrepresentations of the said *Robert Monro* and *William Seale Evans*, and "should and would use and exert his utmost influence and means for procuring such evidence as should or might be requisite to substantiate the claims of the defendant against the said *Robert Monro* and *William Seale Evans*!"— And it was further witnessed, that, in consideration of the covenant thereinbefore contained on the part of the said *Thomas Stanly*, he the defendant did thereby covenant, promise, and agree with and to the said *Thomas Stanly*, his executors and administrators, that he the defendant should and would well and truly pay, or cause to be paid unto the said *Thomas Stanly*, his executors and administrators, one clear and equal eighth part or share of all such sum or sums of money, as should at any time or times thereafter be recovered or obtained, after payment of the costs and expenses to be incurred in the recovery thereof, either by suit at law or in equity, or by voluntary payment of and from the said *Robert Monro* and *William Seale Evans*, or either of them, or their or either of their executors or administrators, by reason of such information to be communicated and given by the said *Thomas Stanly* to the defendant, by virtue of the covenant in the said articles of agreement contained on the part of the said *Thomas Stanly*, and should and would make such payment to the said *Thomas Stanly*, his exe-

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cutors or administrators, within one week next after such money or moneys should be received by the defendant. The plaintiff then averred, that the said *Thomas Stanly* did, immediately after the execution of the said articles of agreement, to wit, on the day and year aforesaid, at *Westminster* aforesaid, communicate unto the defendant all such knowledge and information as he the said *Thomas Stanly* possessed, touching the falsehoods and misrepresentations made by the said *Robert Monro* and *William Seale Evans*, by which the defendant was so induced to quit the said partnership concern, as in the said articles of agreement was mentioned; and did also then, and at all other times after the making of the said articles of agreement, until the recovering of the money by the defendant of and from the said *Robert Monro* and *William Seale Evans*, as thereafter mentioned, communicate unto the defendant all such information as he the said *Thomas Stanly* possessed, or could and might procure or get at, with a view to the recovery by the defendant of all such sum and sums of money as the defendant, as such administrator of the said *Thomas Jones*, had been deprived of, or had lost, through the misrepresentations of the said *Robert Monro* and *William Seale Evans*, and did during all that time use and exert his utmost influence and means for procuring such evidence as was requisite to substantiate the claims of the defendant against the said *Robert Monro* and *William Seale Evans*, (to wit) at *Westminster* aforesaid; of all which said several premises, the defendant there had due notice.—The plaintiff then averred, that the defendant did, after the making of the said articles of agreement, and by reason of such information so communicated and given by the said *Thomas Stanly* to the defendant as aforesaid, and after the death of the said *Thomas Stanly*, to wit, on the 10th *April*, 1829, at *Westminster* aforesaid, and as and by way of a compromise of a certain suit in equity, before then instituted by the defendant against the said *Robert Monro* and *William Seale Evans*, recover, obtain, and receive, by voluntary

payment of and from the said *Robert Monro* and *William Seale Evans*, a large sum of money, to wit, the sum of 14,000*l.* of lawful money of *Great Britain*, after payment of the costs and expenses which had been incurred in and about the recovery thereof, to wit, at *Westminster* aforesaid; whereby, and according to the tenor and effect of the said covenant so made by the defendant as aforesaid, he the defendant then and there became liable to pay, and ought to have paid, to the plaintiff as administratrix as aforesaid, within one week next after he had so received the same as aforesaid, one clear and equal eighth part or share thereof, amounting in the whole to a large sum, to wit, to the sum of 1,750*l.*, of like lawful money, to wit, at *Westminster* aforesaid:—Nevertheless, the defendant, not regarding the said articles of agreement, did not nor would within one week next after he had so received the said sum of 14,000*l.* as aforesaid, or at any time afterwards, (although often requested &c.), pay to the plaintiff, (to whom, after the death of the said *Thomas Stanly*, to wit, on the 31st *July*, 1830, administration of all and singular the goods, chattels, and credits, which were of the said *Thomas Stanly* deceased, at the time of his death, who died intestate, was granted), as administratrix as aforesaid, the said sum of 1,750*l.*, being one clear and equal eighth part or share of the said sum of 14,000*l.* so received as aforesaid, after payment of the costs and expenses as aforesaid, but wholly refused and neglected so to do; whereby and by reason of the said sum of 1,750*l.* being and remaining wholly due and unpaid, an action had accrued to the plaintiff as administratrix as aforesaid, to demand and have of and from the defendant the said sum of 1,750*l.*, parcel of the said sum of money above demanded.

To this declaration the defendant demurred generally, and the plaintiff joined in demurrer.

The cause came on for argument on a former day in this term.

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Mr. Serjeant *Russell* in support of the demurrer.—The agreement set out in the declaration is illegal and void, as it amounts to champerty; the law against which, although of ancient introduction, is not obsolete or grown into desuetude. In *Bell v. Smith*, (in error), Mr. Justice *Bayley* said (a)—“Maintenance and champerty are unlawful, because they encourage and keep alive suits.” Champerty is a species of maintenance, and has always been treated as an offence at common law, and is prohibited or restrained by statute. It is defined to be the unlawful maintenance of a suit, in consideration of some bargain to have part of the thing in dispute, or some profit out of it. Champerty originally applied only to real actions, as it is derived from *campum partire*, because the parties agreed to divide the land &c. in question:—yet by the statute of *Westminster* the first (3 *Edw.* 1, c. 25), it was enacted, “that no officers of the King, by themselves nor by others, shall maintain pleas, suits, or matters, hanging in the King’s Courts, for lands, tenements, or other things, for to have part or profit thereof by covenant made between them; and he that doth, shall be punished at the King’s pleasure:” and in *Hawkins’s Pleas of the Crown* (b), it is said, that maintenance in personal actions, to have part of the debt or damages, is as much within that statute, as maintenance in real actions for a part of the land. By the statute of *Westminster* the second, (13 *Edw.* 1, c. 49), it is enacted, “that the Chancellor, treasurer, justices, nor any of the King’s counsel, nor other officer, &c. shall not receive any church &c. by gift, nor by purchase, nor to farm, nor by champerty, nor otherwise, so long as the thing is in plea before the King, or before any of his officers, nor shall take no reward thereof; and he that doth contrary to that act, either by himself, or by another, or make any bargain, shall be punished at the

(a) 5 Barn. & Cress. 194; S. C. 8 Dow. & Ry. 855.

(b) Book 1, c. 84, s. 6.

King's pleasure, as well he that purchaseth, as he that doth sell." And it is further enacted by the statute 28 *Edw. 1*, c. 11, in the following words: "Because the King hath heretofore ordained by statute, that none of his ministers shall take no plea for maintenance, by which statute other officers were not bounden before this time;—the King will that no officer nor any other (for to have part of the thing in plea) shall not take upon him the business that is in suit, nor none upon any such covenant shall give up his right to another; and if any do, and he be attainted thereof, the taker shall forfeit unto the King so much of his lands and goods as doth amount to the value of the part that he hath purchased for such maintenance. And for this *atteindre*, whosoever will shall be received to sue for the King before the Justices before whom the plea hangeth, and the judgment shall be given by them. But it may not be understood hereby, that any person shall be prohibited to have counsel of pleaders, or of learned men in the law for his fee, or of his parents and next friends." And in *Hawkins's Pleas of the Crown* (a), it is said, that champerty in any action at common law, whether it be real, personal, or mixed, is within this statute. Here, *Thomas Stanly* had no interest in the suit which he sought to sustain, and yet he purchased an interest in the subject matter in dispute, as he bargained for a share of the sum to be recovered—namely, one eighth part of the clear amount of such sum and sums as the defendant should recover through *Stanly's* means. This therefore amounts to champerty, and is an illegal agreement which cannot be enforced by law.

Mr. Serjeant Wilde, contra.—This action is maintainable, as the agreement is valid in law, and does not amount to champerty. When that offence first arose, the state of society was altogether different from what it is at pre-

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sent, and it is evident, from a perusal of the statutes restraining or prohibiting champerty, that the object of the Legislature was to prevent those persons from acquiring an interest in the subject of suits, who might influence the administration of justice. From the same cause arose the doctrine against the assignment of a *chose in action*, because no man should purchase any pretence to sue in another's right. But Mr. Justice *Buller*, in delivering a most elaborate judgment in the case of *Master v. Miller*, said (a)—“it is laid down in our old books, that, for avoiding maintenance, a *chose in action* cannot be assigned, or granted over, to another (b). The good sense of that rule seems to me to be very questionable; and in early as well as modern times it has been so explained away, that it remains at most only an objection to the form of the action in any case. In *2 Rolle's Abr.* (c), it is admitted that an obligation or other deed may be granted, so that the writing passes; but it is said, that the grantee cannot sue for it *in his own name*. If a third person be permitted to acquire the interest in a thing, whether he is to bring the action in his own name, or in the name of the grantor, does not seem to me to affect the question of maintenance. It is curious, and not altogether useless, to see how the doctrine of maintenance has from time to time been received in *Westminster Hall*. At one time, not only he who laid out his money to assist another in his cause, but he that by his friendship or interest saved him an expense which he would otherwise be put to, was held guilty of maintenance (d). Nay, if he officiously gave evidence, it was maintenance, so that he must have had a *subpœna*, or suppress the truth. That such doctrine, repugnant to every honest feeling of the human heart should be soon laid aside, must be expected. Accordingly, a va-

(a) 4 Term Rep. 340.

(c) 45 & 46.

(b) Co. Litt. 214. a. 266. a.; 2 Rolle's Abr. 45, l. 40.

(d) Brooke, tit. “Maintenance,” 7. 14. 17. &c.

riety of exceptions were soon made; and, amongst others, it was held, that if a person has any interest in the thing in dispute, though on contingency only, he may lawfully maintain an action on it (*a*). But in the midst of all these doctrines on maintenance, there was one case in which the Courts of law allowed of an assignment of a *chose in action*, and that was in the case of the Crown; for the Courts did not feel themselves bold enough to tie up the property of the Crown, or to prevent that from being transferred (*b*). Courts of equity, from the earliest times, thought the doctrine too absurd for them to adopt; and, therefore, they always acted in direct contradiction to it. And we shall soon see that Courts of law also altered their language on the subject very much. In 12 *Modern Reports* (*c*), the Court speak of an assignment of an apprenticeship, or an assignment of a bond, as things which are good between the parties; and to which they must give their sanction, and act upon. So, an assignment of a *chose in action* has always been held a good consideration for a promise. It was so in 1 *Rolle's Abr.* (*d*), *Siderfin* (*e*), and Sir *Thomas Jones* (*f*), and lastly, by all the Judges of *England*, in *Mouldsdale v. Birchall* (*g*), though the debt assigned was uncertain. After these cases, we may venture to say, that the maxim was a bad one, and that it proceeded on a foundation which fails." The law, therefore, as to champerty and maintenance, has of late years fallen into disuse, and numerous exceptions have been engrafted on the old rule, which, if followed with ancient rigour, would impede the course of daily transactions between man and man. But here there has been no assignment of any portion of the thing in dispute, but merely a covenant, by which *Thomas Stanly* was to receive a compensation for the trouble and ex-

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(*a*) 2 *Rolle's Abr.* 115.(*e*) 212.(*b*) 3 *Leon.* 198; 2 *Cro.* 180.(*f*) 222.(*c*) 554.(*g*) 2 *Sir W. Bl.* 820.(*d*) 29.

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pense of which the defendant was to reap the benefit. The contract or agreement is not contrary to public policy, because *Stanly* could not interfere with or adopt the defendant's suit. In *Russell on Crimes* (a), champerty is defined to be "a species of maintenance, being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to carry on the party's suit at his own expense." But an assignment of part of a debt is not illegal. A ship-owner may assign policies of assurance to his broker, who may sue the underwriter in the name of the assured. The assignee of a mortgagee may bring an action in the name of the latter. In *Innes v. Dunlop* (b), it was held, that the assignee of a *Scotch* bond might maintain an action of *assumpsit* in this country against the obligor, in his own name; and in *Amory v. Broderick* (c), an action was brought by the assignee of a bond against the assignor, for having released the bond contrary to his covenant; and no objection was raised as to the plaintiff's right to sue: and it is quite clear, since the case of *Winch v. Keeley* (d), that, although the obligee of a bond assigns it to another, he may, notwithstanding, maintain an action upon it against the obligor in his own name, for the benefit of the assignee.

[Mr. Justice *Bosanquet*.—The doctrine as to the law of champerty was much discussed in the case of *Wood v. Downes* (e), where it was decided, that a bond may be set aside in equity, where the consideration, although not strictly champerty, savors of it; and *Stevens v. Bagwell* (f) is an authority to shew that champerty is not confined to Courts of common law.]

It is necessary for the Court to consider—*first*, whether the agreement, upon the face of it, amounts to champerty;

(a) 2nd edit. vol. 1, 179.

(b) 8 Term Rep. 595.

(c) 2 Chit. 329.

(d) 1 Term Rep. 619.

(e) 18 Ves. 128.

(f) 15 Ves. 139.

and *secondly*, whether the consideration is maintenance. A contract to receive part of the thing recovered is not illegal; and assignments are now recognised by Courts of law and of equity, and also by the Legislature, in cases of insolvent debtors or bankrupts, whose property passes to the assignees by the deed of assignment, for the benefit of the creditors.

[Mr. Justice *Bosanquet*.—Could a claim for unliquidated damages arising out of a *tort* be assigned?]

Certainly, in some instances; as in the case of a claim for damages on the running down a ship, which if insured, the assured may assign the policy to his broker, and if not insured, he may borrow money for the purpose of prosecuting his suit, and lodge the policy with the party making the advance, by way of security. As, therefore, there is no illegal consideration on the face of the agreement, and a bargain to receive part of the thing recovered may be assigned, there is neither champerty nor maintenance in this case, and the plaintiff is entitled to judgment.

Mr. Serjeant *Russell*, in reply.—It is quite clear that the law as to champerty is not obsolete or to be rejected by the Court; for, in *Bell v. Smith*, Mr. Justice *Bayley* said,—"the action was brought at the instance of *Armet* and three others; it was then found that they had not sufficient evidence to support it, and machinery was resorted to, calculated to introduce all the evils of champerty and maintenance. First, *Armet*, without consideration, released all his interest to the nominal plaintiffs in the suit; that was not considered sufficient; and then, in consideration of ten shillings, all the parties interested joined in an assignment to *Lacklan* and *Robertson*. It is difficult to put a stronger instance of maintenance or champerty. Those are unlawful, because they encourage and keep alive suits." And Mr. Justice *Holroyd* said—"the direct and express object of the assignments was, to support the action; the old law of

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maintenance is therefore applicable to the transaction." It is not necessary to dispute that *choses in action* are, in several instances, assignable, as in the case of a bill of exchange, or policy of assurance, or any other mercantile instrument for the convenience of commerce. In *Russell on Crimes* (a) it is said—"maintenance seems to signify an unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hindrance of common right. This may be, where a person assists another in his pretensions to lands, by taking or holding the possession of them for him by force or subtilty; or where a person stirs up quarrels and suits, in relation to matters wherein he is in no way concerned; or it may be where a person officiously intermeddles in a suit depending in a Court of Justice, and in no way belonging to him, by assisting either party with money, or otherwise, in the prosecution or defence of such suit. Where there is no contract to have part of the thing in suit, the party so intermeddling is said to be guilty of maintenance generally; but if the party stipulate to have part of the thing in suit, his offence is called champerty." Therefore, where a party enters into an agreement to assist in the carrying on a suit, and stipulates to receive a part or share of the thing in suit, it amounts to champerty. Although unliquidated damages may in some instances be assignable, yet the party tendering his assistance can have nothing to do with the suit. He cannot assist or stipulate to receive any share. And in *Bacon's Abridgment* (a) it is said—"champerty is an offence extremely abhorred by our law. Nor was it less so by the laws of other countries. By a statute of Robert I. of Scotland: '*Nec terram seu aliquam rem aliam capiat ad champarte, ad defendendum, differendum, seu prolongandum jus alterius extra formam juris.*' Du Fresne, *verbo Campiparticeps.*' And, by the

(a) 2nd Edit. Vol. 1, 176.

(a) Tit "*Champerty*," 5th Edit. by Gwillim, Vol. 1, 574, n.

Roman law, '*qui improbè cœrunt in alienam litem, ut quicquid ex condemnatione in rem ipsius redactum fuerit inter eos communicaretur, lege Julia de vi privata tenentur*;' F. 48. 7. 6; and the offenders were punished by the forfeiture of a third part of their goods, and perpetual infamy. 4 *Bl. Com.* 135."

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Lord Chief Justice TINDAL now delivered the judgment of the Court as follows:—

The question upon the present record is this—whether the contract stated in the deed upon which the action is brought, is a legal contract, capable of being enforced in a Court of law? The deed recites, that *Thomas Stanly* had given the defendant reason to believe that certain representations made to him were false; and that he, *Stanly*, being in possession of evidence to manifest the same, had agreed to communicate such evidence to the defendant upon receiving from him a certain sum expended in obtaining the same, and upon having an agreement by the defendant to pay him one eighth part of the clear amount of such sums as the defendant should recover through the means of *Stanly*. The deed then contains a covenant by the defendant with *Stanly*, to the effect of the agreement above recited.

The agreement, therefore, is, in effect, a bargain by a man who has evidence in his own possession respecting a matter in dispute between third persons, and who at the same time professes to have the means of procuring more evidence, to *purchase* from one of the contending parties, at the price of the evidence which he so possesses or can procure, an eighth part or share of the sum of money which shall be recovered by means of the production of that very evidence. And we all agree in thinking that such an agreement cannot be enforced in a Court of law.

The offence of champerty is in the old books defined to

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be the unlawful maintenance of a suit, in consideration of some bargain to have part of the thing in dispute, or some profit out of it. That this was considered in earlier times, and in all countries, an offence pregnant with great mischief to the public, is evident from the provisions made by our own law in the statutes of *Westminster* the 1st and 2nd, and from the language of the civil law, which was afterwards received as the law over the greater part of the continent (a). The object of the law was, not so much to prevent the purchase or assignment of a matter then in litigation, as the purchase or assignment of a matter in litigation, for the purpose of maintaining the action; as is evident from Lord *Coke's* reading on the statute of *Westminster* 2nd, c. 49 (b), where he remarks—"True it is, that, if any *other person* (i. e. than the Chancellor, treasurer, and other persons mentioned in the act), purchase *bond fide*, depending the suit, he is not in danger of champerty; but these persons here prohibited cannot purchase at all, neither for champerty, nor otherwise, depending the plea;"—evidently pointing to the distinction, that the offence of champerty consisted in purchasing an interest in the thing in dispute, with the object of maintaining and taking part in the litigation: and we see no reason to doubt that the offence of champerty, in this restricted sense, remains the same as heretofore. Courts of equity have, in various modern cases brought before them, held the offence still to exist. In *Stevens v. Bagwell* (c), where a bill was filed, for the purpose, amongst other things, of declaring void an agreement which had been made by a seaman for the sale of his chance of prize-money to his prize-agents, who were to carry on the suit, the Master of the Rolls (Sir *William Grant*) says (d): "I expressed, at the hearing, my opinion, that the agreement was void from the beginning; as amount-

(a) *Vide* Dig. 48. 7. 6.

(b) 2 Inst. 484.

(c) 15 Ves. 139.

(d) *Ib.* 156.

ing to that species of maintenance, which is called *champerty*, viz. the unlawful maintenance of a suit, in consideration of a bargain for a part of the thing, or some profit out of it" (a).

Now, in the present case, *Thomas Stanly* does purchase an interest in the subject-matter of dispute, not in terms, indeed, but in substance and effect, as he bargained distinctly for a share of the sum to be recovered. He does not, indeed, stipulate that he is to furnish money for the carrying on of the suit, or that he is to carry it on himself; but he stipulates that "he should and would use and exert his utmost influence and means for procuring such evidence as should be requisite to substantiate the claims of the said defendant." And if there is any difference between this contract and direct champerty, it appears to us to be strongly against the legality of this contract; as, besides the ordinary objection, that a stranger to the controversy has acquired an interest to carry on the litigation to the uttermost extent, by every influence and means in his power, the bargain to furnish and to procure evidence for the consideration of a money payment in proportion to the effect produced by such evidence, has a direct and manifest tendency to pervert the course of justice.

We therefore think that, in this case, there ought to be—

Judgment for the defendant.

(a) See also 18 Ves. 126, and the opinion of the Master of the Rolls in 2 Jacob & Walk. 135.

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The plaintiff effected a policy of insurance against fire, which contained a condition, that if fraud should appear in the claim made, or false swearing in support thereof, the claimant should forfeit all benefit under such policy.

The plaintiff's property was insured in 1000*l.*, and he made an affidavit, that, in consequence of the fire, he had sustained damage to the extent of 1085*l.* Having sued the Directors for the amount, the Jury, after conflicting evidence on both sides, found a verdict for the plaintiff for 500*l.* The Court directed a new trial.

LEVY v. BAILLIE and two Others.

THIS was an action of *assumpsit* on a policy of assurance against fire; by which the plaintiff sought to recover from the defendants, three of the Directors of the *Palladium Assurance Company*, the sum of 1,085*l.*, being the alleged amount of the loss and damage sustained by the plaintiff, in consequence of a fire which occurred on his premises, on the evening of *Sunday*, the 14th *February*, 1830. The policy contained, among others, the following condition:—

“*Fifteenth*—Persons insuring with the said society, sustaining any loss or damage by fire, are required to give immediate notice thereof at the principal office of the said society, or to the authorized agents of the society in their respective districts, and are also to deliver in as full an account of their loss or damage as the nature of the case will admit of, and to make proof of the same by their affidavit or affirmation, and produce such other evidence as the Directors of the said society may reasonably require; and until such affidavit or affirmation, account, and evidence shall be produced, the amount of such loss, or any part thereof, shall not be payable or recoverable; and if there shall appear fraud in the claim made, or false swearing or affirming in support thereof, the claimant shall forfeit all benefit under such policy.”

At the trial, before Lord Chief Justice *Tindal*, at *Westminster*, at the sittings after the last term, it appeared that the plaintiff was an upholsterer, and carried on his business in a small house at *Chalcroft Terrace*, in the *New Cut*, *St. George's Fields*, that the policy was dated on the 22nd *November*, 1827, by which the plaintiff effected an insurance on the fixtures, stock in trade, furniture, linen, china, glass, and pictures, in his house, to the amount of 1,000*l.*—The plaintiff made an affidavit that articles

and goods, his property, were destroyed, lost, and damaged by the fire on his premises, to the amount of 1,085*l.*, which sum he claimed from the Directors of the *Palladium*. The goods so lost were alleged to consist of four-post bedsteads, mahogany and rose-wood tables, of various sizes and descriptions, couches, chairs, stools, pier glasses, *Turkey* and other carpets, rugs, linen, paintings, pictures, and various other articles. The plaintiff also proved that his stock in trade, at the time of the fire, was worth between 1,000*l.* and 2,000*l.*; that nearly the whole of it had been removed, that a great part of it had been deposited in the *Coburg Theatre* and other adjacent places; and that goods to the amount of 1,000*l.* had been stolen or taken away by the populace who had assembled at the fire, and which had never been recovered.

For the defendants it was contended that this claim was fraudulent; and several witnesses were called, who stated that they considered it to be impossible for such a large quantity of bulky goods to have been carried off, particularly as there were several policemen on the spot soon after the fire broke out, and who kept off the mob; that the fire was extinguished in about two hours, and that no ponderous article could have been carried away unobserved. The Lord Chief Justice having summed up the whole of the evidence to the Jury, left it to them to say whether the plaintiff had made a fraudulent demand. They found a verdict for the plaintiff, damages 500*l.*

Mr. Serjeant *Taddy*, in the last term, obtained a rule nisi that this verdict might be set aside and a new trial had, on the ground, that, as by the 15th clause of the policy, a party insuring, who made a fraudulent claim, was to forfeit all benefit under the policy, and the plaintiff had claimed 1,085*l.*, and the Jury had found that he was entitled to 500*l.* only, such claim was evidently fraudulent; and, therefore, the finding of the Jury amounted in effect

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to a verdict for the defendants, and the Jury could not have decided on the question which was properly left to them, and was the only point for their consideration. The verdict, as it now stands, is not only unintelligible, but is clearly against the weight of evidence, as the defendants proved that such articles as the plaintiff had described as having lost through the depredations of the mob who had assembled round his house, could not have been carried away unobserved by the policemen who were in attendance at the time.

Mr. Serjeant *Wilde* and Mr. Serjeant *Andrews*, on a former day in this term, shewed cause, and submitted that there was no satisfactory evidence adduced at the trial, from which the Court could infer that the plaintiff had made a fraudulent claim on the Directors of the *Palladium*. The finding of the Jury does not necessarily imply that there was any fraud in the plaintiff's claim, or false swearing in support of it, so as to bring it within the 15th clause of the policy. He might have estimated the goods at more than their real value. The plaintiff stated and proved that his loss arose from depredation in the removal of the goods, which is not within the terms or meaning of the clause in question, although such loss is protected by the policy. At all events, the Court will not presume fraud, and as the question was properly left to the Jury, and they have found a verdict for the plaintiff, such verdict ought not to be disturbed, and there is, consequently, no ground to send the case down to a further investigation.

Mr. Serjeant *Taddy*, Mr. Serjeant *Russell*, and Mr. Serjeant *Bompas*, in support of the rule.—Although the plaintiff stated that his loss arose principally from goods taken and carried away by the populace, who were assembled on the occasion of the fire; yet the Court will

consider that several of the goods alleged to have been so lost were not of a portable nature, for instance, pier glasses, four-post bedsteads, dining tables, and other articles of a like description; and if the plaintiff's claim were founded on a fraudulent exaggeration as to the quantity, quality, or amount of the goods lost, the defendants are protected by the 15th clause of the policy; and the Court will not suffer the Company to be imposed upon by false or fraudulent claims. At all events, the verdict was against the evidence, and the question of fraud could not have been considered by the Jury.

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Lord Chief Justice TINDAL now said, that the Court had considered all the circumstances of this case with great care and anxiety, and they were unanimously of opinion that the defendants were entitled to have the question further investigated by another Jury; and, therefore, that the rule for a new trial should be made—

Absolute, on payment of costs.

MANNING v. CLEMENT.

THIS was an action on the case for a libel.

The declaration stated—That, before and at the time of committing the several grievances by the defendant thereafter mentioned, the plaintiff had exercised and carried

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In an action for a libel, the plaintiff alleged in his declaration, that, at the time of the publication, he exercised and carried on, in a lawful

manner, the trade and business of a manufacturer of bitters, with which, in the way of his trade, he supplied various licensed publicans, and then proceeded to state, that the defendant published the libel of and concerning the plaintiff in the way of his trade:—*Held*, that evidence might be admitted under the general issue, with reference to the allegation of the trade or business of the plaintiff, that what he sold was not bitters, but a composition of a different description.

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on, and did exercise and carry on, *in an honest and lawful manner*, the trade and business of a manufacturer of various bitters, with which, in the way of his said trade, he supplied various licensed publicans; and certain of which bitters were called and known by the name of the *Imperial Purl Bitters*, to wit, at &c.:—yet the defendant, well knowing the premises, but contriving and wickedly and maliciously intending to injure the plaintiff in his good name, fame, and credit, and to bring him into public scandal and disgrace with and amongst all his neighbours, and other good and worthy subjects of this realm, theretofore, to wit, on &c., at &c., falsely, wickedly, and maliciously, did publish, and cause and procure to be published, of and concerning the said plaintiff *in the way of his said trade*, a certain false, scandalous, malicious, and defamatory libel, in which said libel was contained the false, scandalous, malicious, and defamatory matter following, of and concerning the said plaintiff *in the way of his said trade*, that is to say &c.

The libel set forth, without the necessary *innuendoes*, was as follows:—

“Adulteration of porter—To the editor of *Bell's Life in London*—Sir,—It appears that the Crown lawyers have consented to a compromise of the prosecution against Mr. *Manning* for manufacturing what he called *Purl Bitters*, but which, instead of being bitters, was stuff for adulterating porter. It has been hinted that this compromise has been made with the intention of allowing Mr. *Manning* to give evidence as an informer, against a hundred or two publicans who have been using this stuff. I hope it is not true that such is to happen, but I think that, instead of the quiet manner in which this prosecution has been allowed to end, the thing ought to be exposed as much as possible. The excise have no wish for exposure, because they have suffered the manufacture of the article for years, and are probably

ashamed of their neglect. But let us have an exposure of the men who have been guilty of such nefarious practices. They deserve exposure; they deserve the greatest punishment. The public ought to know who the publicans are that have been enriching themselves at the expense of their customers' health. Can we be surprised at the stylish manner in which some publicans live, when we find, that, by using a gallon of this mixture, called "*Manning's Bitters*," an unprincipled man might take upwards of twenty gallons of porter from a butt, and substitute water? And in justice to the fair and honest publican, and to the brewer, an exposure ought to be made of the fraudulent dealer; and I think the public must feel interested on the subject, when they learn that, upon the examination at the *Royal Institution*, *Manning's Bitters* was found to be composed partly of green vitriol and alum! What hell-broth are we to have next, instead of Sir *John Barleycorn*? Yours, &c."

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The plaintiff then averred that he had suffered a general injury in his good name, fame, and credit; and alleged, by way of special damage, that many publicans, whom he named, had, in consequence of the libel, ceased to deal with him in the way of his trade and business.

The defendant pleaded the general issue.

At the trial, before Mr. Justice *Park*, at the sittings at *Westminster*, in the last term, the plaintiff, after proving the publication of the libel by the defendant, the editor of the newspaper called *Bell's Life in London*, called several witnesses to prove the excellent quality of his bitters, and the extent of his trade; and a number of publicans and victuallers stated, that they had ceased to deal with the plaintiff, in consequence of the publication of the libel in question.

The defendant's counsel then called witnesses to shew, that the plaintiff's trade was unlawful, and that the bitters

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were made and sold to adulterate porter; and that they were composed of ingredients prejudicial to health; and that a large quantity had been seized by an excise officer, and condemned in the Court of *Exchequer*; and the judgment of that Court, imposing heavy penalties on the plaintiff, was offered in evidence, but objected to, on the ground that it amounted in effect to prove the truth of the charge imputed by the libel, which could not be resorted to under the general issue, the defendant having put no plea of justification on the record. But the learned Judge, after consulting with the Judges of the Court of *King's Bench*, who were then sitting in *Banc*, admitted the evidence, and told the Jury that there was no doubt but that the publication was a libel on the plaintiff in the way of his trade, but that it was a material allegation in the declaration that the plaintiff carried on, in an honest and lawful manner, the trade and business of a manufacturer of bitters, and that they might apply the evidence offered by the defendant to that allegation; and that it was for them to say whether the plaintiff carried on a lawful trade, and was truly a manufacturer of bitters, or whether, under that pretence, he manufactured an article of a wholly different description? The Jury were also cautioned, that they were not to consider the evidence in question as applicable in any shape to a justification of the truth of the libel, or in mitigation of damages, but only as to the allegation of the legality of the plaintiff's trade or business, as averred in the declaration.

The Jury found a verdict for the defendant.

The plaintiff, in person, in the last term, obtained a rule *nisi*, that this verdict might be set aside, and a new trial had, on the ground that the evidence offered by the defendant, as to the nature of the plaintiff's trade, ought not to have been received under the general issue, and

that, if the defendant intended to rely on the illegality of such trade, he should have pleaded it specially, when the plaintiff might have had an opportunity of calling witnesses to shew that the trade was lawful, and that the bitters were not of a noxious or pernicious quality. That he, the plaintiff, had been misled by the plea of the general issue, as he supposed and was advised, that, under that plea, it was sufficient for him to prove the publication of the libel in question by the defendant.

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Mr. Serjeant *Wilde*, on a former day in this term, shewed cause.—The plaintiff proved that he was making a large income by the sale of his bitters; and that his business had been nearly destroyed by many publicans having ceased to deal with him, in consequence of the publication of the libel by the defendant. The *gravamen* of the charge was the injury the plaintiff has sustained in the way of his trade; and he alleged in the declaration, that he exercised and carried on, in an honest and lawful manner, the trade and business of a manufacturer of various bitters, that is, of bitters which might be lawfully sold, and not an article of an unwholesome or noxious nature. It was incumbent on him to prove that the trade he carried on was a lawful trade; and although the defendant did not plead that the plaintiff carried on an illegal business, yet the defendant might shew that he did so; and when he proved that the bitters were unwholesome and noxious, it was a complete answer to the action. The plaintiff treated the publication as a libel on his trade or business, and not on his conduct independently of such trade; he therefore should have been prepared to prove that the trade was lawful; and as he alleged, by way of special damage, that the profits of his business were diminished in consequence of several publicans having ceased to deal with him, the defendant might shew that the business was in the nature of a public nuisance; or, that the ingredients of which the bitters

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were composed, were noxious or prejudicial to health. The evidence tendered and objected to, was not received to prove the truth of the charge imputed by the libel, but merely to shew the nature and description of the trade the plaintiff carried on, and whether he exercised it in an *honest or lawful* manner, as alleged in the declaration; and when the defendant shewed that the trade was illegal, and that a large quantity of the plaintiff's manufactured bitters had been seized and condemned by the Court of *Exchequer*, his right of action was gone, for he had no ground to complain of an injury done to a business which he had no right to carry on. In *Hunt v. Bell* (a), the plaintiff, who was the proprietor of the *Tennis Court*, brought an action for a libel contained in a newspaper, imputing misconduct to him as such proprietor; and he proved that he had sustained damage by the publication of the libel; but the Jury found a verdict for the defendant, on the ground that the occupation was illegal, as it tended to encourage prize-fighting; and the Court refused to disturb the verdict, or grant a new trial. In *Spall v. Massey* (b), in an action on the case for exhibiting an inscription on a board, opposite to the plaintiff's house, intimating that it was a house of ill fame, the plaintiff alleged in his declaration that he carried on the business of a retailer of wines in the house; and in order to prove that allegation, he produced a license from the excise office, regularly signed, and by which he was authorized to deal in wines; but, for the defendant, it was objected, that this was not sufficient, as the plaintiff should shew, that he had also taken out a license to sell ale and beer, since the statute 39 *Geo. 3*, c. 59, s. 9, prohibited any person from selling wine by retail, unless he had also a license to sell ale and beer; and the plaintiff was nonsuited. Here, as the plaintiff alleged, that he carried on trade in an honest and

(a) 7 B. Moore, 212; S. C. 1 Bing. 1.

(b) 2 Stark. Rep. 559.

lawful manner, it was at least incumbent on him to prove that he did so; and as he offered no evidence on that point, the defendant might shew that the trade was illegal under the general issue. So, after the plaintiff had called witnesses, to prove that he had sustained an injury in his trade by the publication of the libel, the defendant might give evidence of the truth of any part of the libel, or to explain the circumstances under which it was published. The defendant not only proved that the trade was illegal; but that heavy penalties had been imposed on the plaintiff for carrying it on. In *Delany v. Jones (a)*, it was held, that an advertisement in a newspaper, whereby a party requested to be informed whether a particular person had been guilty of a transportable offence, (*vis.* bigamy), is not a libel, if the party requiring the information be interested in the discovery, and the inquiry be made *bond fide*. There, the defendant, under the general issue, proved that the advertisement had been inserted by the authority of the plaintiff's wife, for the purpose of discovering whether he had another wife living; and Lord *Ellenborough* said—"I conceive the law to be, that though that which is spoken or written may be injurious to the character of the party, yet, if done *bond fide*, as with a view of investigating a fact in which the party making it is interested, it is not libellous."

[Lord Chief Justice *Tindal*.—If an action for a libel be brought by a surgeon, and he alleges in his declaration that he was lawfully practising and carrying on business as such, is it competent to the defendant to shew, under the general issue, that he was not legally practising as a surgeon? Should it not be pleaded by way of justification?]

It is unnecessary to answer that question, as here, the plaintiff alleged in his declaration, that he was carrying on a lawful trade, which he failed to prove; and the defend-

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(a) 4 Esp. Rep. 191.

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ant might then shew, that the trade was illegal; which he did, by producing the judgment of the Court of *Exchequer*, which is a judgment *in rem*, and conclusive to shew that the bitters manufactured by the plaintiff were of a deleterious nature, and pernicious to health.

Mr. Serjeant *Storks*, in support of the rule.—The question is, whether, the plaintiff having alleged in his declaration that he carried on the trade of a manufacturer of bitters, in an honest and lawful manner, the defendant could adduce evidence, under the general issue, that the trade was illegal? The libel in question is an attack on the plaintiff's character as a tradesman; and the only point in issue, and which it was incumbent on the plaintiff to prove, was, the publication of the libel. In an action for a libel on a glover, in the way of his trade, if the defence rest on his selling *French* gloves, which are a prohibited article, the defendant must plead it by way of justification. In *Hunt v. Bell*, the plaintiff averred in his declaration, that he was the proprietor of the *Tennis Court*, which he permitted to be used for the purpose of exhibiting the art of pugilism or boxing, called sparring. It therefore appeared, by his own allegation, that his business or occupation was illegal. So, in *Yrissari v. Clement* (a), it was held, that an action for a libel cannot be maintained for any thing written against a party, touching his conduct in an illegal transaction; and the illegality of the loan the plaintiff came to negotiate, was apparent on the face of the declaration. If the defendant had meant to rely on the illegality of the plaintiff's trade, he should have pleaded it by way of justification; for, in *Smith v. Richardson* (b), it was expressly decided that, in an action for words, the defendant cannot give in evidence the truth of them under the ge-

(a) 11 B. Moore, 308; S. C. 3 Bing. 432.

(b) Willes, 20.

neral issue; and, in the late case of *Jones v. Stevens* (a), the Court of *Exchequer*, after great consideration, held, that general evidence of the plaintiff's bad character and ill repute in his business as a practising attorney could not be admitted, either to contradict the allegation in the declaration, that the plaintiff had exercised and carried on the business of an attorney with credit and reputation, with a view to mitigating damages on the general issue, or in support of averments in pleas pleaded by the defendant by way of justification, that the plaintiff was a disreputable professor and practitioner in the law; and the case of the Earl of *Leicester v. Walter* (b) was over-ruled. In *Jones v. Stevens*, Mr. Baron *Wood*, in delivering a most luminous judgment, observed (c)—“it was said, that if the defendant had no right to plead a justification in such general and indefinite terms, in bar of the action, he might still give evidence to the same effect, under the general issue, in mitigation of damages; in other words, although you cannot plead it to avoid damages being given against you, you may give it in evidence in order to diminish them. Now, I take upon myself to deny all that. There exists no such distinction in law: and I hold that you can no more be permitted to give particular or general evidence of that nature in mitigation of damages, than to plead it in bar of the action, and for the same obvious reason, *viz.* that the plaintiff cannot come prepared to meet it.” That reasoning is precisely in point; and here, the allegation by the plaintiff at the commencement of the declaration, that he exercised his trade in an honest and lawful manner, is a mere formal averment; and if the defendant had meant to impute illegality or fraud to him in the way of his trade, he should have set it out on the record, in order that the plaintiff might have been prepared to meet or rebut it at the trial.

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(a) 11 Price, 235.

(b) 2 Camp. 251.

(c) 11 Price, 275.

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Lord Chief Justice TINDAL, now delivered the judgment of the Court as follows:—

The declaration in this case stated, “that, at the time of publishing, &c., the plaintiff had exercised and carried on, and did exercise and carry on, in an honest and lawful manner, the trade and business of a manufacturer of various bitters, with which, in the way of his said trade, he supplied various licensed publicans;” and then proceeded to state that the defendant published of and concerning the said plaintiff, in the way of his said trade, the libel in question. The defendant pleaded the general issue. At the trial, the plaintiff gave general evidence that he was a manufacturer of bitters, and proved the publication of the libel, and the *innuendo* that it related to him in the way of his trade; and, after he had closed his case, the defendant offered evidence with a view to prove that what the plaintiff sold was not bitters, but a composition of a very different description. This evidence was objected to on the part of the plaintiff, on the ground that it in effect amounted to proof of the truth of the charge imputed by the libel, in a case where there was no plea of justification. The learned Judge, however, who tried the cause, admitted the evidence, stating to the Jury that it was a material allegation in the declaration that the plaintiff was a manufacturer of various bitters; and that they must apply the evidence to that allegation, and say whether the plaintiff was truly a manufacturer of bitters, or whether, under that pretence, he manufactured an article of an entirely different description; and he also cautioned the Jury that they were not to consider the evidence in question as applicable in any way to the justification of the truth of the libel, or in mitigation of damages, but simply to the truth of the allegation of the plaintiff’s trade or business.

The question now raised before us is, whether this evidence was properly admitted? We are of opinion, that,

with reference to the allegation of the trade or business of the plaintiff, the evidence was properly received.

No rule can be more firmly established than that the defendant cannot give in evidence the truth of the imputation contained in the libel, without pleading such truth as a justification. Since the case of *Underwood v. Parks* (a), there has never existed a doubt on this point. But it is equally certain, that where a written libel contains a charge upon a man in the way of his trade or business, the allegation of such trade or business must be strictly proved as it is set forth in the declaration, and that the defendant is at liberty to bring evidence to disprove the fact. And it appears to us that such proof is equally admissible, notwithstanding it may so happen in the particular case, that the disproving the allegation of the trade does, in effect and substance, prove the truth of the imputation in the libel. The necessity of hearing evidence on both sides as to the description of the trade in the declaration being admitted, the legality of such investigation in any particular case cannot depend on the form of the libel.

If the present libel had contained a charge that the plaintiff, as such trader in bitters, was in insolvent circumstances, or had defrauded his creditors, no one could have doubted that evidence to shew that he was not a manufacturer of bitters, but of a very different material, might have been brought forward by the defendant. How, then, can it be less admissible, because the libel imputes a charge, the truth of which happens to be made out by the evidence in question? There is not the mischief in allowing this evidence which occurs in other cases; for the plaintiff comes prepared to set up the proof of his trade as stated in the declaration, and to meet any contrary evidence on that point.

Upon the whole, without giving any opinion as to the weight of the evidence when produced, we agree in think-

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(a) 2 Str. 1200.

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ing that it was admissible for the point, and with the restriction with which it was admitted, and therefore we think that the present rule must be.

Discharged.

7 Bing. 379.

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RICHARD BOYMAN BOYMAN v. JOHN MATTHEW GUTCH.

In *assumpsit* by the purchaser of a reversionary interest of money in the funds, to recover back a deposit made by him on the sale of such property at an auction, on the ground that the vendor had failed to make out a good title, the only question for a Court of law to consider, is, whether, at the time of the sale, the vendor had a legal title to sell and convey to the purchaser.

A. (a widow) having a life-interest in money in the funds, and also in a leasehold house, with a contingent reversionary interest to such of her children as should be living at the time of her death; she and all her children joined in

THIS was an action of *assumpsit*, and brought to recover the sum of 111*l.*, and 10*l.* 15*s.* 11*d.* interest thereon, together with the costs of examining into the title of the defendant to certain property sold by auction to the plaintiff.

The declaration contained two special counts. The first count stated, in substance, that the defendant, by his auctioneers and agents in that behalf, on the 30th *November*, 1827, caused to be put up and exposed to sale by public auction, the life-interest of a widow lady, represented to be of the age of fifty-eight years, in the sum of 760*l.* New 4*l.* *per cents.*, to commence on the 30th *July*, 1828; also the reversion to the principal sum, receivable upon the demise of the lady, provided any of her five children then living should survive her, who then were of the respective ages of between thirty-three and thirty-six, thirty-one, twenty-nine, twenty-seven, and twenty-four; upon and subject to the following (amongst other) conditions, that is to say:—

“*Third condition*—That the purchaser should pay down immediately a deposit of 20*l.* *per cent.* in part of the purchase-money; and sign an agreement to pay the remainder on or before the 21st *December*, 1827; but if, from any cause, the purchase should not be completed, interest

an assignment to a trustee of all the money in the funds, and the house, to hold, receive, and take the leasehold, moneys, funds, and other premises, to the trustee, upon trust, to receive and convert the same into money; and that, for this purpose, he might, at his own discretion, sell and dispose of the leasehold house, and of any reversionary interest in the funds; and it was further provided, that the trustee should not, during the term of five years, exercise or put in force the trusts declared, so as to deprive *A.* of her life-interest during that period:—*Held*, that, after the expiration of the five years, the trustee had a power to sell *A.*'s property in the funds.

should be paid on the balance of the purchase-money at the rate of 5*l. per cent.* up to the time of completing the purchase—That the purchaser should be entitled to all advantages from the hour of the sale.

“*Fourth condition*—That the purchaser should have a proper assignment of the property, at his or her own expense, on payment of the remainder of the purchase-money, agreeably to the third condition.”

The plaintiff then averred, that, on such exposure to sale as aforesaid, to wit, on the 30th *November*, 1827, at &c., the plaintiff was declared to be, and became the purchaser of the said life-interest and reversion, upon and subject to the aforesaid conditions, for a certain sum of money, to wit, the sum of 555*l.*; and then and there paid down 111*l.* as a deposit of 20*l. per cent.* in part of the said purchase-money, and then and there signed an agreement to pay the remainder of the purchase-money on or before the 21st *December*, 1827: and thereupon, afterwards, to wit, on &c., at &c., in consideration that the plaintiff, at the special instance and request of the defendant, had then and there undertaken and faithfully promised the defendant to perform and fulfil all things in the said conditions of sale contained on the part of the plaintiff, as purchaser as aforesaid, to be performed and fulfilled, the defendant undertook, and then and there faithfully promised the plaintiff to perform and fulfil all things in the said conditions mentioned on the part of the defendant, as vendor as aforesaid, to be performed and fulfilled: but that, although the plaintiff, on the 30th *November*, 1827, and from thence until and upon the 21st *December*, 1827, and from thence hitherto, had been always ready and willing to perform and fulfil all things in the said conditions mentioned on his part and behalf, as purchaser as aforesaid, to be performed and fulfilled, and to pay the remainder of the said purchase-money, and the expense of a proper assignment of the said life-interest and reversion, and to complete the

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said purchase, whereof the defendant, on &c., at &c., had notice, and was then and there requested by the plaintiff to make him a proper assignment of the said life-interest and reversion, and to perform the said conditions, and his, the defendant's, promise on his part;—nevertheless, the defendant, not regarding his promise and undertaking, nor the said conditions of sale, then and there craftily and subtilly deceived the plaintiff in this, to wit, that, at the time of the exposure to sale, and from thence until and upon the 21st *December*, 1827, and from thence hitherto, the defendant had not a good right or title to sell or assign, or cause to be assigned to the defendant the life-interest and reversion, in pursuance of the said conditions of sale, and did not nor would at the time for completing the said purchase, or at any time before or since, shew or make, or procure to be made to the plaintiff a proper title to the said life-interest and reversion, or make or procure to be made such proper assignment as aforesaid, or shew a title enabling him to do so, according to the said conditions, but wholly neglected and refused so to do: by reason whereof, the plaintiff had been and was deprived of all benefits and advantages which would have arisen to him from the completion of the said purchase; and had been put to great expenses, amounting in the whole to a large sum of money, to wit, the sum of 100*l.*, in endeavouring to procure such title and assignment as aforesaid, and to get the said purchase completed; and had lost all gains and profits which he might and would otherwise have made and acquired from using and employing the said sums of money so paid by him as a deposit as aforesaid, and other monies provided and kept by him the plaintiff for the completion of the said purchase.

The second special count stated in substance—the putting up and exposure to sale of the life-interest and reversion, as in the first count mentioned; the plaintiff's having become the purchaser thereof, under and subject to the said conditions; his having paid the sum of 111*l.* as a deposit, and signed the agreement in the first count mentioned, ac-

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cording to the said conditions; and that, the said purchase not being completed, theretofore, to wit, on the 2nd *February*, 1828, it was mutually agreed by and between the defendant and the plaintiff, that the sale of the said life-interest and reversion should be delayed until the month of *July* then next, on the terms that the plaintiff should then pay the principal and interest on the balance of the said purchase-money; that the said deposit should be invested in an Exchequer bill, to remain in the hands of the auctioneers, and that the said sale should be considered and treated as a new sale at the time of completion in the month of *July*: and thereupon, mutual promises in conformity therewith; and breach by the defendant.

The declaration also contained the usual common counts. The defendant pleaded the general issue.

At the trial of the cause, before Lord Chief Justice *Tindal*, at the Sittings at *Guildhall*, after the last *Trinity Term*, a verdict was found for the plaintiff, for the sums claimed, amounting to 14*l.* 15*s.* 11*d.*, subject to the opinion of the Court upon the following case:—

“ On the 30th *November*, 1827, the defendant put up to sale by public auction the life-interest of a widow lady, *Mrs. Sarah Anne Phippen*, in the sum of 760*l.* New 4*l.* *per cent.* Bank Annuities, to commence on the 30th *July*, 1828, and also the reversion to the principal sum receivable upon her decease, provided any of her five children, then living, should survive her, subject to certain conditions of sale, amongst which were the following:—‘ That the person who should become the purchaser should immediately pay a deposit of 20*l.* *per cent.* in part of the purchase-money, and sign an agreement to pay the remainder on or before the 21st *December*, 1827; but that if, from any cause, the purchase should not then be completed, interest should be paid upon the balance of the purchase-money, at 5*l.* *per cent.* up to the time of completing the

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purchase, and, that the purchaser should be entitled to all advantages from the hour of sale,'—and also, 'that the purchaser should have a proper assignment of the property at his own expense, on payment of the remainder of the purchase-money.'

"At the sale, the plaintiff became the purchaser of that property at the sum of 555*l.*, and paid immediately into the hands of the defendant's agents, the auctioneers, the sum of 111*l.*, being the proper deposit of 20*l. per cent.* upon the purchase-money, and for recovery of which, with the interest, this action was brought.

"An agreement was also then entered into on the part of the plaintiff, for the payment of the remainder of the purchase-money, pursuant to the conditions of sale above mentioned.

"The defendant, on the 13th *December*, 1827, furnished to the plaintiff's attorneys an abstract of the title to the said life-hold interest and reversion, in which was a copy of the deed hereinafter set out, and from which the title of the defendant to sell the said life-interest, and also the said reversionary interest, was alone derived.

"By that deed, made the 29th *July*, 1823, between *James Phippen*, of the city of *Bristol*, merchant, *Sarah Anne Phippen*, of the same city, widow, *John Phippen*, of *Pimlico*, in the county of *Middlesex*, accountant, and *Elizabeth Phippen*, *Mary Phippen*, and *Hannah Phippen*, all of the said city of *Bristol*, spinsters, of the one part; and *John Matthew Gutch*, of the city of *Bristol*, of the other part—after reciting, that *William Phippen*, late of *Bristol*, accountant, deceased, duly made and published his will, bearing date the 21st *August*, 1818, and thereby gave and devised unto his friends *Joel Morcom* and *William Knight*, of the city of *Bristol*, all that messuage and dwelling-house and out-houses at *Butcombe*, with the several pieces and parcels of ground thereto belonging and appertaining, and also all those closes called *Church Closes*, upon trust, to sell, dis-

pose of, and convey the same, either together or by parcels, as to them or him should seem best, the proceeds to be placed out at interest on good and sufficient security, either government or otherwise, for the benefit of his said wife during her natural life, and at her decease to call in and divide the same equally between all his children then living; that the testator then gave to his wife his leasehold dwelling-house wherein he resided, together with all the furniture therein for and during her natural life, and after her decease to her three daughters, *Elizabeth*, *Mary*, and *Hannah*, for the joint benefit of two only, if one should marry, and the same for one, if two should marry, unless the last remaining unmarried daughter should give consent in writing to the trustees therein named (to whom he gave and devised the same in trust), for the purpose of the whole being disposed of and equally divided between all his children then living: that the testator departed this life without revoking his said will, which, in the month of *March*, 1820, was duly proved by the said *Joel Morcom* and *William Knight*, the executors therein named, in the Episcopal Court of *Bristol*: that the hereditaments at *Butcombe*, mentioned in the testator's will, having been sold, the net proceeds were invested in government securities, and now consisted of the sum of 760*l.*, or some other sum, New 4*l. per cent.* Bank Annuities: that the said *James Phippen* was indebted to the said *John Matthew Gutch* in the sum of 185*l.* for money lent, advanced, and paid on his account; that the said *John Matthew Gutch* had also become a security for the said *James Phippen*, guaranteeing the due payment by him to Messrs. *Ricketts & Co.*, bankers, *Bristol*, of the further sum of 300*l.*, which amount the said *John Matthew Gutch* had been called on to pay and discharge; and that, the said *James Phippen* being unable to make good and provide for the aforesaid debts and demands, the said *Sarah Anne Phippen*, *John Phippen*, *Elizabeth Phippen*, *Mary Phippen*, and

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Hannah Phippen had agreed to join with him in making such security to the said *John Matthew Gutch* as was thereafter contained—it was witnessed, that, for the considerations aforesaid, and also in consideration of the sum of ten shillings, to each of them paid by the said *John Matthew Gutch*, they, the said *James Phippen, Sarah Anne Phippen, John Phippen, Elizabeth Phippen, Mary Phippen, and Hannah Phippen*, bargained, sold, assigned, transferred, and set over unto the said *John Matthew Gutch*, his executors, administrators, and assigns, all that the said sum of 760*l.*, or other the sum whatsoever, in the 4*l. per cent.* Bank Annuities, produced by the sale of the said hereditaments at *Butcombe* as aforesaid, and the dividends and annual produce of the same; and also all that the said leasehold dwelling-house mentioned in the will of the said testator, situate and being in the city of *Bristol*, with the appurtenances thereto belonging, then in the occupation of the said *Sarah Anne Phippen*, and all the renewable and other estate, term and terms of years, and all the right, title, and interest, legal and equitable, vested and contingent, in possession, reversion, remainder, or expectancy, of them, the said *James Phippen, Sarah Anne Phippen, John Phippen, Elizabeth Phippen, Mary Phippen, and Hannah Phippen*, in and to the same premises, with full power, as their and each of their attorney and attorneys, to demand, sue for, and recover the same, and every part thereof; to have, hold, receive, and take the said leasehold hereditaments, monies, funds, securities, and other premises thereinbefore assigned, or intended so to be, unto the said *John Matthew Gutch*, his executors, administrators, and assigns, upon the trusts thereafter contained, that is to say, upon trust that the said *John Matthew Gutch* should receive and convert the same into money, and for that purpose should, at his discretion, and without further authority, sell and dispose of the said leasehold dwelling-house, and of any reversionary and contingent interest in the said

stocks, funds, and securities, either by public or private sale, and should convey the same to a purchaser: and it was declared, that *John Matthew Gutch* should stand possessed of all monies which should come to his hands by virtue of those presents, upon the trusts following; that is to say, upon trust, in the first place, to reimburse himself all costs and charges which he should incur in and about the execution of the trusts thereby created; and, in the next place, upon trust, that the said *John Matthew Gutch*, his executors or administrators, should thereout or otherwise be paid and satisfied the said sum of 185*l.*, with interest at 5*l. per cent.* to be calculated thereon from the date thereof, and also all such part of the said sum of 300*l.* guaranteed to the said Messrs. *Ricketts & Co.* as the said *John Matthew Gutch*, his executors or administrators, should be called on to pay, and should pay, with like interest on such payment; and, subject to the said trusts, that the said *John Matthew Gutch*, his executors, administrators, and assigns should stand possessed of the said premises in trust for the said *James Phippen, Sarah Anne Phippen, John Phippen, Elizabeth Phippen, Mary Phippen*, and *Hannah Phippen*, their executors and administrators respectively, according to their respective rights and interests therein. And the said *James Phippen, Sarah Anne Phippen, John Phippen, Elizabeth Phippen, Mary Phippen*, and *Hannah Phippen*, did, for themselves, their heirs, executors, and administrators, and each of them did, for himself and herself, his and her heirs, executors, and administrators, covenant and agree with the said *John Matthew Gutch*, his executors, administrators, and assigns, that they, the said *James Phippen, Sarah Anne Phippen, John Phippen, Elizabeth Phippen, Mary Phippen*, and *Hannah Phippen*, or one of them, should and would forthwith pay to the said *John Matthew Gutch*, the said sum of 185*l.*, and also all such part of the said sum of 300*l.* as the said *John Matthew Gutch*, his executors or administrators, should be called on to pay, and

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should pay, with interest on the same several sums after the rate aforesaid, and that without any deduction or abatement whatsoever. [Covenant for further assurance, and that *Gutch's* receipts should be a discharge to purchasers.] Provided always, and it was thereby lastly declared, that the said *John Matthew Gutch*, his executors, administrators, and assigns, should not, *during the term of five years* from the date of those presents, exercise or put in force the trusts declared of the premises thereinbefore assigned to him, in such a manner as to deprive the said *Sarah Anne Phippen* of her life-interest therein during the same period.

“Some objections having been raised to the defendant's power to sell the property, it was agreed that the completion of the purchase should be delayed till *July, 1828*, the deposit being invested in Exchequer bills, and the purchaser paying interest on the balance of the purchase-money. The deposit was accordingly invested, and the title of the defendant to sell continued to be discussed by the plaintiff's and the defendant's solicitors, and further opinions were taken and mutually communicated. An assignment or conveyance had not yet been made of the property sold by the defendant, but the defendant had always been ready and willing to make and execute an assignment to the plaintiff of the life-interest and reversion, in pursuance of the particulars and conditions of sale, and in conformity with the stipulations for delaying the completion of the purchase till *July, 1828*, as far as the powers contained in the deed enabled him so to do.

“The plaintiff contended, among other things, that, by the deed above set out, the defendant had no title to, or power to sell the life-interest of *Mrs. Sarah Anne Phippen*, in the sum of 760*l.* New 4*l.* per cents., and could not convey the same to the plaintiff; and the defendant contended that the deed gave him power to sell, and also to convey such life-interest to the purchaser.”

If the Court should be of opinion that the plaintiff

was entitled to recover, the verdict was to stand for the sum of 141*l.* 15*s.* 11*d.*, or to be reduced to the sum of 121*l.* 15*s.* 11*d.*, as the Court should direct; but, if the Court should be of opinion that the plaintiff was not entitled to recover, a verdict was to be entered for the defendant.

The case came on for argument on a former day in this term.

Mr. Serjeant *Wilde*, for the plaintiff.—The first and main question is, whether the deed set out in the declaration authorized the defendant to sell Mrs. *Sarah Anne Phippen's* life-interest in the New 4*l. per cents.*, and convey such interest to the plaintiff? That must depend upon the construction to be put upon the whole of the deed. It appears by the recital, that one of Mrs. *Phippen's* sons having become indebted to the defendant, she, and her four other children, agreed to join her son in assigning her life and reversionary interest in a certain sum in the funds, as a security for the son's debt. Courts of equity construe powers of sale with the greatest strictness, and always incline to favour a surety, but not the party claiming a right to exercise the power. The deed in question is not accurately framed, and did not empower the defendant to sell Mrs. *Phippen's* interest in the stock in question, during her life-time. The sum of 185*l.* only was due from the son, to secure which, his mother and all her children joined in assigning to the defendant the sum of 760*l.* 4*l. per cent.* Bank Annuities, and the dividends and annual produce of the same, and also the leasehold dwelling-house then in the occupation of Mrs. *Phippen*, and all the renewable and other estate and interest therein, to have, hold, receive, and take the leasehold hereditaments, moneys, funds, securities, and other premises assigned, unto the defendant, upon trust, that *he should receive and convert the same into money*, and, for that purpose, should, at his discretion, and without further

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authority, sell and dispose of the said *leasehold dwelling-house*, and of *any reversionary and contingent interest in the said stocks, funds, and securities*. Taking the whole of this clause together, the implied, if not the manifest intent was, that the defendant should not dispose of Mrs. *Phippen's* property in the funds, during her life-time, without further authority from her; for, although the defendant was to receive the funds *and convert them into money*, yet that general authority is limited by the words which immediately follow, viz. "and for that purpose to sell the *reversionary and contingent interest in the stocks and funds*." The defendant, therefore, was only entitled to receive the dividends during the life of Mrs. *Phippen*, and to convert the reversionary interest into money. The Court will not intend that the parties meant to give the defendant an absolute power of sale during the life of the mother, who with her children were mere sureties for the debt of one of her sons. The whole of the deed contains a mere declaration of trust, under which the defendant was to hold the leasehold premises and money in the funds. As the plaintiff was the purchaser at an auction, he could not be aware of the nature of the defendant's title, and the buyer is not to be put to the expense of discussing the vendor's right, or be compelled to pay the purchase-money, if it be probable that the property may be involved in litigation. Although it may be said, that the proviso at the end of the deed authorized the defendant to exercise the trusts declared, and proceed to a sale, *after the expiration of the term of five years* from the date of the deed, yet the trusts were confined to the premises thereinbefore assigned to him, viz. the leasehold house, and the reversionary interest in the funds. At all events, it is questionable, whether the defendant was justified in selling Mrs. *Phippen's* life-interest in the funds; and it has long been a settled and invariable rule, that a purchaser cannot be compelled, either at law or in equity, to accept a

doubtful title. In the late case of *Curling v. Shuttleworth* (a), the defendant, an auctioneer, offered a policy of assurance to sale by auction, and it was stated in the particulars that it would be sold by order of the executors of a mortgagee, and under a power of sale. The plaintiff became the purchaser, and deposited part of the purchase-money with the defendant at the time of the sale: and it was held, that the vendors were bound to produce a clear and indisputable title, and, they having failed to do so, that the plaintiff was entitled to recover back his deposit in an action for money had and received; and Lord Chief Justice *Tindal* said—"The rule is, that where, upon the sale of an estate, the title of the vendor is so questionable as to excite doubt or difficulty, or to render it probable that the right of the purchaser may become a matter of investigation in a Court of equity, a Court of common law will not compel the vendee to complete the purchase; as he cannot be obliged to accept or take a doubtful, or even an equitable title;" and Mr. Justice *Park* said—"It has long been a settled and invariable rule, that a purchaser of a real estate cannot be compelled to accept a doubtful title, and we ought not to drive parties into a Court of equity."

[Mr. Justice *Alderson*.—The decision in that case has been since questioned in the Court of *King's Bench*.]

Still, the principle is correct. In *Elliot v. Edwards* (b), Lord *Alvanley* decided, that, if a purchaser would be liable in equity, he is entitled to recover back his deposit at law; and asked—"What is the nature of the deposit? Is it not made upon the condition that the purchase shall be completed free from all reasonable objections?" In *Hartley v. Pehall*, Lord *Kenyon* said (c)—"When a man buys any commodity, he expects to have a clear indisputable title, and not such a one as may be questionable, at least in a

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(a) 3 Moore & Payne, 368; S. C. 6 Bing. 121.

(b) 3 Bos. & Pul. 181. (c) Peake's Ni. Pri. Cas. 131; 3d edit. 179.

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Court of law. No man is obliged to buy a law-suit." And in *Wilde v. Fort* (a), it was held, not only that a purchaser is not bound to accept a doubtful title, but that, if the vendor of an estate sold by auction does not shew a clear title by a specified day, the purchaser may recover back his deposit, and rescind the contract, without waiting to see whether the vendor might ultimately be able to establish a good title: and in the case of *Sir Samuel Romilly v. James*, Lord Chief Justice Gibbs said (b)—" It is intimated, that, if any doubt can be cast on the title of the vendor, the plaintiff (the purchaser) will be entitled to recover back the deposit. Now, if he had gone into a Court of equity, the Chancellor would not, perhaps have obliged an unwilling purchaser to ratify the contract." As, therefore, a purchaser cannot be compelled to take an equitable title, neither will a Court of law compel him to accept a doubtful title, as it would be contrary to the principle of all the current authorities. *Lastly*, the plaintiff is entitled to recover the costs he has incurred for examining the defendant's title, as he set out the conditions of sale in the declaration, and alleged by way of special damage, that he had expended the sum of 100*l.* in endeavouring to procure the title, and get the purchase completed. In *Richards v. Barton* (c), it was held that *assumpsit* was maintainable for the interest of money procured to complete a purchase, and also the expenses of investigating the title, and preparing the conveyance, where the vendor misrepresented the charges affecting the estate. In *Kirtland v. Pounsett* (d), the expenses of investigating a title which turned out to be defective, were recovered by the purchaser, in an action for money had and received; and, in the late case of *Walker v. Moore* (e), where A. having contracted with B. for the purchase of an estate,

(a) 4 Taunt. 334.

(c) 1 Esp. Rep. 268.

(b) 1 Marsh. 600; S. C. 6 Taunt. 274.

(d) 2 Taunt. 146.

(e) 10 Barn. & Cress. 416.

the vendor acting *bond fide*, delivered an abstract, shewing a good title; and *A.*, before he examined it with the original deeds, contracted to re-sell several portions of the property at a considerable profit; but, upon a subsequent examination of the abstract with the deeds, *A.* discovered that the title was defective; upon which the sub-purchasers refused to complete their purchases, and *A.* refused to complete his purchase from *B.*, and brought an action, wherein he claimed as damages the expenses which he had incurred in the investigation of the title—it was held that he was entitled to recover them, as well as nominal damages for the breach of contract.

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Mr. Serjeant *Russell, contra.*—It is unnecessary to consider the question, whether the plaintiff is entitled to recover the costs which he alleged he had been put to in endeavouring to procure, and examining into the defendant's title, as, by the terms of the deed in question, the defendant had a good title to sell the life-interest of Mrs. *Phippen*, in the funds. Although it has been said that a power of this description must be construed strictly against the party who seeks to exercise or enforce it; yet, the Court will look at the intention of the parties, and the fair interpretation to be put on the whole of the instrument. Again, it has been contended that the defendant had only a right to receive the dividends during the life of Mrs. *Phippen*; but, by the deed, the sum of 760*l.* in the 4*l per cent.* Bank Annuities, and the dividends and annual produce were assigned, together with a leasehold house, in order to secure 185*l.* due to the defendant from one of Mrs. *Phippen's* sons. The defendant was not bound to wait until her death; and the Court will assume that her life-interest was assigned: and, although the reversionary and contingent interest is only mentioned in the explanatory part of the clause which gives the power to sell the property, yet it was not intended that Mrs. *Phippen's* life-interest should be excluded. In order to give

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effect to the meaning of the parties, and the object of the deed, the word *reversionary* may be applied—*first*, by considering the interest after the expiration of the five years, as a reversionary interest: so, the word *contingent* may have a like signification, as *Mrs. Phippen* might have died before the expiration of the five years, and which the framer of the deed no doubt had in contemplation. *Secondly*, if the word *reversionary* is to be taken as applicable only to the interests of the children, then the whole clause may be considered as meant to direct an immediate sale, as if the word *forthwith* had been introduced, restraining the sale of *Mrs. Phippen's* life-interest until the expiration of the five years. But the property was conveyed to the defendant generally, to be by him converted into money; and how could he do so but by a sale of *Mrs. Phippen's* interest, as well as her children's, in the property in the funds and the leasehold house? But the proviso at the end of the deed removes all doubt; for, it is thereby provided, that the defendant should not, during the term of five years from the date of the instrument, exercise or put in force the trusts declared of the premises thereinbefore assigned to him, in such a manner as to deprive *Mrs. Phippen* of her life-interest therein during the said period; and here, the sale did not take place until after the expiration of the five years: and the word *premises* is not to be confined or applied to the leasehold house only, but to the whole of the property previously conveyed. It must be considered that *Mrs. Phippen* and all her children, with the exception of her son *James*, are sureties, and therefore ought to contribute in proportion to their respective interests; and the contribution by her would be unequal, if only the dividends of her stock were to be taken after the expiration of the five years, and the interests of the children were to be sold. There can, therefore, be no doubt but that the deed was intended to convey to the defendant a power of sale of all the funded and leasehold property, and if so, the defendant had clearly a right

to dispose of *Mrs. Phippen's* life-interest in the stock. The plaintiff, therefore, cannot raise an objection to the title offered by the defendant; and, if it be a marketable title, it is sufficient; for, in *Romilly v. James*, Lord Chief Justice *Gibbs* said (a)—“It is said that the plaintiff will have made out his claim to recover back his deposit, if a cloud is cast on the title. That is not so in a Court of law; he must stand by the judgment of the Court, as they find the title to be, whether good or bad; and, if it be good in the judgment of a Court of law, he cannot recover back his deposit. If he had gone into a Court of equity it might have been otherwise. I know a Court of equity often says, this is a title, which, though we think it available, is not one which we will compel an unwilling purchaser to take; but that distinction is not known in a Court of law.”

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Mr. Serjeant *Wilde*, in reply.—The plaintiff is, under the circumstances, entitled to recover the expenses incurred in investigating the defendant's title. In *Sugden's Vendor and Purchaser* (b), the case of *Turner v. Beaurin* is referred to, where Lord Chief Justice *Gibbs*, who was then at the bar, was counsel for the vendor, and the defendant, the purchaser, obtained a verdict for his deposit, with interest, and *the expenses of investigating the title*, without argument; it being admitted that the title was defective. The rule that a purchaser cannot be compelled to take a doubtful title, was recognised and fully established in the House of Lords, in the case of *Blosse v. Clanmorris* (c); and Lord *Redesdale* there said—“A purchaser has a right to require a marketable title; and this title, it must be admitted, rests on a point of law, which at least is doubtful. This being so, the purchaser, who has been obliged to keep his money in readiness, and deprived of the opportunity of vesting it in another purchase, has been hardly used, and is entitled to his costs.” Although, by the

(b) 6 Taunt. 274.

(b) 6th Edit. 214.

(c) 3 Bligh, 62.

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deed, the defendant was to take the leasehold house, funds, and other securities, upon trust to receive and convert the same into money; yet the purpose of the trust was expressed, by which he was only authorized to sell the leasehold, and reversionary and contingent interest in the funds. The words must be taken *reddendo singula singulis*; according to which construction the defendant was only to receive the dividends during the life of Mrs. Phippen, and convert the reversionary interest into money; and as this was expressly directed, a more general authority cannot be implied; and, if one part of a clause in a deed be ambiguous or doubtful, it ought not to affect that part which is clear: the sale of the reversionary or contingent interest might have been sufficient to satisfy the debt due to the defendant from *Thomas Phippen*, the son, without sacrificing his mother's life-interest in the funds, particularly as the defendant might have received the dividends during her life.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court as follows:—This was an action of *assumpsit* in which the plaintiff has assigned as the breach of contract by the defendant, that, at the time of the exposure of the property in question to sale, the defendant had not a good right or title to sell or assign to the plaintiff the life-interest and reversion therein mentioned, in pursuance of the conditions of sale, and did not make out a proper title to the same. The title of the defendant to this property depends upon the construction of the trust deed of the 29th July, 1823, and we are therefore called upon to say, what the construction of that deed is, and whether it does authorize the defendant to put up to sale, and to sell the property in question, or not. We are not to consider ourselves as a Court of equity, where the seller is seeking to enforce the purchase by a bill for a specific performance; in which case that Court frequently refuses the aid of its

authority to enforce a performance, where the title is of an unmarketable or even doubtful description, leaving the party to his action at law for damages; but we are called upon to answer the simple question on this record, whether, on the construction of a deed, the defendant has or has not a legal title to convey to a purchaser; and, although the deed appears to be inartificially framed, we think, upon the proper construction of it, the defendant has, and at the time of the exposure to sale had, good right and title to sell and assign to the plaintiff; and, consequently, that the present action, grounded on that breach of contract, cannot be maintained.

It appears, by the recital in the deed, that *Sarah Anne Phippen* had a life-interest in a certain sum in the funds; and also in a leasehold dwelling-house, and the furniture thereof, with a contingent reversionary interest therein, to such of her children as should be living at the time of her decease; and that *James Phippen*, one of the sons, having become indebted to the defendant, the said *Sarah Anne Phippen*, and all her children had agreed to join in the assignment to the defendant, as a security for the debt of the son. The mother and the children then join in assigning to the defendant all the said sum in the funds, and the dividends and annual produce of the same; and also the leasehold dwelling-house, and all their renewable interest therein, 'to hold, receive, and take the leasehold hereditaments, moneys, funds, securities, and other premises, to the defendant, upon trust that he, the defendant, should receive and convert the same into money.' Now, if the deed had stopped at this place, little doubt could have been raised, but that the intention of the parties was, that the defendant should convert *all the premises*, that is, the funded property amongst the rest, into money; which could only be done or effected by a sale thereof. But, it is contended that the direction which follows, restrains this general authority to sell from applying to the funded pro-

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perty; for the deed states:—" And for this purpose, the defendant shall, at his discretion, and without further authority, sell and dispose of the said *leasehold dwelling-house*, and of any reversionary and contingent interests in the said stocks, funds, and securities." And, it is contended, that the manifest implication of this clause is, that the defendant was not to dispose of the funded property during the wife's life, at his own discretion, and without further authority. But the answer appears to be, that however this might have been, if the last clause had stood alone, yet the proviso at the end of the deed supplies the direction as to the wife's interest for her life; for it is thereby provided, that the defendant shall not, *during the term of five years* from the date of the indenture, exercise or put in force the trusts declared of the premises, in such manner as to deprive the said *Sarah Anne Phippen* of her life-interest therein *during the said period*—implying, that, after the expiration of the term of five years, the defendant might put the trusts in execution. The interpretation of the clauses, taken together, appears therefore to be, that the defendant was not to dispose of the wife's interest until after the expiration of the term of five years, unless further directions were given within that period. But here the sale took place *after* the expiration of the five years. The sale by auction appears, therefore, to have been a legal act. And this is further confirmed by the express declaration of the trusts as to the moneys raised by sale of the premises; for the deed states that the defendant shall stand possessed of the moneys which came to his hands by virtue of the said indenture, in trust for the said *Sarah Anne Phippen*, and the said several children, their executors and administrators, according to their respective rights and interests therein. Now, it never could be intended that the defendant should be interested in these moneys to be raised by the sale of the wife's estate, without having a power of sale thereof.

It therefore appears to us, that the defendant had, at the

time this life-interest was exposed to sale, the right to put the same up to sale, and to sell the same. Whether a Court of equity would compel a purchaser to accept such a title, is a question which we are not called upon to decide. All that we profess to determine is, the legal construction of the deed, which appears to us to negative the allegation above set forth in the declaration. We therefore think there was no defect of title in the defendant, and consequently that the judgment must be for him.

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Judgment for the defendant accordingly.

WORRALL v. JAMES JONES, WILLIAM BAKER, and EDWARD JONES.

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THIS was an action of debt on bond in the penalty of 1000*l.*, dated in *January*, 1816, and conditioned for the payment of rent and performance of covenants by the defendant, *Edward Jones*, as tenant to the plaintiff from year to year, pursuant to articles of agreement bearing even date with the bond.

Where a co-defendant on the record, who had suffered judgment by default, consented to be examined as a witness:—

The defendants *James Jones* and *Edward Jones*, suffered judgment by default, and the defendant *Baker* pleaded in bar, that *Edward Jones's* tenancy under the agreement ceased at *Lady-day*, 1826, up to which time all the rent had been paid. The plaintiff replied, that *Edward Jones's* tenancy continued until *Michaelmas*, 1829, and the issue ultimately raised was, whether the tenancy expired at *Lady-day*, 1826, or continued up to *Michaelmas*, 1829.

Held, that his testimony was admissible, provided he had no interest in the event of the suit.

At the trial, before Mr. Justice *Bosanquet*, at *Guildhall*, at the Sittings after the last *Easter Term*, the plaintiff called the defendant *Edward Jones*, as a witness, to prove that his tenancy, under the agreement of 1816, continued to 1829. He did not himself object to being exa-

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mined; but for the defendant *Baker* it was insisted, that his testimony was inadmissible, as he was a party to the record. The learned Judge, however, thought that as he was the principal debtor, and could not call on the two other defendants for contribution, and as he did not object to be examined, his testimony was admissible, and he allowed it to be received. The Jury having found a verdict for the plaintiff, the learned Judge reserved to the defendant *Baker* leave to move the Court to set it aside, and that a new trial might be had, in case they should be of opinion that the testimony of *Jones* had been improperly admitted.

Mr. Serjeant *Merewether*, in the last *Easter* Term, obtained a rule *nisi* accordingly.—Although, in *Doe d. Harrop v. Green* (a), it was held, that one of two defendants in ejectment, who had suffered judgment by default, might be called to prove the holding by the other defendant under the lessor of the plaintiff; yet Lord *Ellenborough* there said, that the witness had not a direct interest, but only a remote and possible advantage, which could not render him incompetent; whilst here, if the plaintiff recovered either against *Baker* or *James Jones*, the witness's stock on the farm and his goods would not be liable to a distress for rent, and which he was interested in preventing. In *Brown v. Brown* (b), in an action on a joint contract against two defendants, and one suffered judgment by default, it was held that he was not admissible as a witness against the other, to prove that he joined in the contract. In *Chapman v. Graves*, Mr. Justice *Le Blanc* said (c)—“the general rule was, that no person who was a party to the record was admissible as a witness; that in the case of *Ward v. Haydon* (d), the co-defendant was called to exculpate the

(a) 4 Esp. Rep. 198.

(b) 4 Taunt. 752.

(c) 2 Camp. 334, n.

(d) 2 Esp. Rep. 552.

other defendants; here, it was proposed to call a co-defendant to inculcate the others. The cases therefore were distinguishable." And that learned Judge added, that "he was disposed, where there was innovation, not to extend the rule." In *Emmett v. Bradley* (a), it was held, that a co-defendant who had pleaded his bankruptcy could not be admitted as a witness for the other defendants; and in *Mant v. Mainwaring* (b), in an action of *assumpsit* on a bill of exchange, against several defendants, as partners, it was held, that one of them, who had suffered judgment by default, and to whom the plaintiffs had severally given a release, was not admissible as a witness, to prove that he and the co-defendants were partners at the time the bill was drawn, without the consent of the co-defendants, as his testimony might tend to inculcate them: and Mr. Justice Burrough said—"The rule that a party who is interested in the event of the suit cannot be examined as a witness, is so general, that this case does not form an exception. If the parties consent to the examination of a witness, every rule respecting his admissibility is destroyed; but it is, nevertheless, necessary for all the parties on the record to consent to such examination;" and here, the defendant *Baker* objected to the admissibility of *Jones* as a witness, as he was a party to the record.

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Mr. Serjeant *Wilde*, on a former day in this term, shewed cause.—The rule that a party to the suit on the record cannot be a witness either for himself or for a joint suitor, against the adverse party, is not because he is a party to the record, but on account of the immediate and direct interest which he has in the event of the suit, either from having a certain benefit or loss, or from being liable to

(a) 1 J. B. Moore, 332; S. C. 7 Taunt. 599.

(b) 2 J. B. Moore, 9; S. C. 8 Taunt. 139.

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costs. But it may be said, that a party to the record is incompetent as a witness, because it almost invariably happens, that he is interested. Here, however, the witness was called against his own interest, and he did not object to being examined; and as he was the principal debtor to the plaintiff, the two other defendants being his sureties, he could not claim contribution from them; and if they had been called on to pay the damages and costs in case the plaintiff obtained a verdict, the witness would have been bound to recoup them; and he was primarily liable for the whole of the rent during the time he occupied the premises under the plaintiff. In actions on contracts a co-plaintiff has been frequently called as a witness. Accordingly, in *Norden v. Williamson* (a), where one of several plaintiffs came forward voluntarily to disprove the defendant's liability to the demand made upon him, it was held, that he might be admitted with the consent of the adverse party, although at the same time he defeated the claim of those who sued jointly with him; for, said Sir *James Mansfield*—"If the plaintiff had made a declaration out of Court, that he had never been employed by the defendant, evidence of that declaration would be admissible. How is the proof less credible, if the plaintiff comes into Court and declares the same thing upon his oath?" In *Brown v. Fox* (b), in an action on a joint contract against two defendants, where one let judgment go by default, Lord *Kenyon* refused to admit him as a witness for the other defendant to negative the contract; yet there, the party who was called had an interest to defeat the action; because, if the contract were negatived as to one, it would fail as to the others; and the plaintiff could not make use of the judgment by default against him. Although, in *Ward*

(a) 1 Taunt. 378.

(b) Phillipps on Evidence, MS. 5th Edit. Vol. 1, 75.

v. *Haydon* (a), Lord *Kenyon* ruled at *Nisi Prius*, that a defendant in an action of trover who suffered judgment by default, might be a witness for his co-defendant who had pleaded; yet it was on the ground that the witness was not liable to the costs of the issue tried against the other defendant, and was not released himself, whatever the event of the issue might be. In *Raven v. Dunning* (b), where one of several defendants in a joint action pleaded his bankruptcy, and the others the general issue, it was held, that he could not be admitted to give evidence for the rest, although he had obtained his certificate; because, in case of a verdict for the plaintiff, he would be liable to the costs of the action. In *Doe d. Harrop v. Green* (c), the only supposed interest imputable to the witness was the possibility that the plaintiff would sue the then defendant alone; he was therefore considered competent to prove that his co-defendant was in possession of the premises sought to be recovered. There is no legal objection to the competency of persons who are parties to a suit, in a corporate capacity, and, consequently not liable to costs, and who are free from all interest in the question in issue; for, in *Weller v. The Governors of the Foundling Hospital* (d), in an action against them for the amount of work done by the plaintiff, Lord *Kenyon* admitted several of the governors to prove the badness and insufficiency of the work. In *Brown v. Brown*, the witness was held to be incompetent, because, if the plaintiff succeeded, he would be entitled to a contribution from his co-defendants; whilst, if the plaintiff failed, the witness would be liable to the whole of the demand. He therefore had an interest in the event of the suit, whichever way it was determined. Although in

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(a) 2 Esp. Rep. 552.

(b) 3 Esp. Rep. 25.

(c) 4 Esp. Rep. 198.

(d) Peake's Ni. Pri. Cas. 153,
 3d Edit. 206.

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Chapman v. Graves, Mr. Justice *Le Blanc* is reported to have said, that the general rule was, that no person who was a party to the record was admissible as a witness; yet, the principle upon which that rule was founded is, whether the witness has or has not an interest in the event of the suit. That *dictum*, therefore, cannot be considered as an authority. In *Mash v. Smith* (a), in trespass against three defendants, one, who had suffered judgment by default, was called as a witness for his co-defendants; and although Lord Chief Justice *Best* was of opinion that he was interested, as his evidence might tend to reduce the damages against him, yet his Lordship received his testimony, reserving leave to the plaintiff to move the Court upon the point; but it does not appear that any motion was afterwards made. In *Buller's Nisi Prius* (b), it is said, that in ejectment, if a material witness for the defendant be also made a defendant, the right way is for him to let judgment go by default. In *Emmett v. Bradley*, Mr. Justice *Dallas* said (c)—“The general rule is clear, that no person appearing as a party on the record can be admitted as a witness in the action, unless it appear that such person is acquitted of his liability to the action, and then he may be admitted as a witness for the other defendants. That is the true principle; and although in *Mant v. Mainwaring* that learned Judge is reported to have said, that it has been established as an universal rule, that a party to the record cannot be examined as a witness without the consent of all parties; yet he, no doubt, added, that he might be admitted, provided he had no interest in the event of the suit; and Lord Chief Baron *Gilbert*, in his *Law of Evidence*, after laying down the rule (d), that no person interested in the

(a) 1 Car. & Payne, 577.

(c) 1 J. B. Moore, 338.

(b) 7th Edit. by Bridgman, 93 a.

(d) 1st edit. 4to., 86.

matter in suit can be a witness for himself, deduces the corollary (a) that the plaintiff or defendant cannot be a witness in his own cause, for these are the persons that have a most immediate interest. That, however, does not apply to a party to the record merely because he is a party; and here it is quite clear that the witness had no interest whatever in the event of the suit.

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Mr. Serjeant *Merewether*, in support of his rule.—The witness had an interest to fix the two other defendants who were his sureties on the bond, and he was also interested to support the existence of his tenancy to *Michaelmas*, 1829, under the original agreement of 1816. The cases referred to, where parties to the record were admitted as witnesses, were chiefly actions of *tort*, in which each defendant is separately liable. Besides, they were mere *Nisi Prius* decisions, and ought not to weigh against the more solemn determination of the Court in the late cases of *Emmett v. Bradley*, and *Mant v. Mainwaring*, the latter of which is expressly in point. In *Norden v. Williamson*, all parties consented that the co-plaintiff should give evidence; and Sir *James Mansfield* said—“ I know no reason why, if the defendant is willing to admit him, and the plaintiff is willing to give evidence against himself, he should not be suffered to do so.” Here, however, the defendant *Baker*, who alone pleaded to the action, objected to the admissibility of *Edward Jones* as a witness, as he was a party to the record; and the Court will assume that he had an interest in the result of the suit.

Cur. adv. vult.

Lord Chief Justice TINDAL.—In this case of debt on bond, conditioned for the payment of rent and the performance of agreements by *Edward Jones*, one of the de-

(a) 1b, 94.

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fendants, he, and the defendant *James Jones*, suffered judgment by default; and the only defendant who pleaded in bar to the action was *William Baker*, and the issue raised upon his plea was, whether the tenancy had continued during the time the rent was alleged to have become due.

At the trial of this issue, the plaintiff proposed to call the said *Edward Jones* as a witness, to prove the continuance of the ancient tenancy. No objection could arise, on the ground that *Edward Jones* was interested to procure a verdict for the plaintiff who called him, inasmuch as, being the principal debtor, he could not call for or obtain contribution from the two other defendants, but must himself be ultimately liable both to the damages and costs recovered in this action. The witness did not himself object to be examined, but an objection was made on the part of *Baker*, the defendant who had pleaded; and the question reserved for our consideration is, whether a defendant, who has suffered judgment by default, and who consents to be examined, is an admissible or competent witness, where he has no interest in the event of the suit, and the only objection to his admissibility is, that he is a party upon the record. And upon this question we are of opinion that his testimony was admissible. No case has been cited, nor can any be found, in which a witness has been refused, upon the objection in the abstract, that he was a party to the suit; on the contrary, many have been brought forward, in which parties to the suit, who have suffered judgment by default, have been admitted as witnesses against their own interest; and the only inquiry seems to have been, in a majority of the cases, whether the party called was *interested in the event* or not, and the admission or rejection of the witness has depended on the result of this inquiry. The exclusion on the ground of *interest*, is a well-known principle of the law of evidence; and so much did Lord Chief Baron *Gilbert* consider this

as the only solid objection against the evidence of a party to the suit, that, after laying it down as a general rule (a), that no man interested in the matter in question can be a witness for himself, he afterwards states (b), that several corollaries may be deduced from this rule; of which he gives, as the first—"That the plaintiff or defendant cannot be a witness in his own cause; for these are the persons that have a most immediate interest, and it is not to be presumed that a man who complains without cause, or defends without justice, should have honesty enough to confess it" (c). That a party to the record should not be *compelled against his consent* to become a witness in a Court of law, is a rule founded on good sense and sound policy. It forms the point of the decision in the case of *The King v. The Inhabitants of Woburn* (d), and the decision in that case leads to the necessary inference, that if the party consents to be examined, he is then an admissible witness. We think, therefore, where the party to the suit, who has suffered judgment by default, waives the objection and consents to be examined, and is called against his own interest, there is no ground, either on principle or authority, for rejecting him.

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This rule therefore must be—

Discharged.

(a) Gilbert's *Law of Evidence*,
1st Edit. 4to. 86.

(c) See 4th Edit. 130.

(b) *Ib.* 94.

(d) 10 East, 395.

OCKLEY, Demandant; FURBER, Tenant; WARD, Clerk,
and Others, Vouches.

MR. Serjeant *Wilde*, on a former day, moved, that a recovery might pass, notwithstanding the word "received"

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In a recovery, the word "received" having been substituted for "acknowledged," at the foot of the *precipe* and warrant of attorney, the Court would not allow the recovery to pass.

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Demandant;
FURBER,
Tenant;
WARD,
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had been substituted for "acknowledged," at the foot of the *præcipe* and warrant of attorney, which was as follows:—"Taken and *received* on &c., before &c." The learned Serjeant observed, that the word *received* had been formerly used instead of acknowledged; but—

Mr. Justice PARK now said, that the late rule promulgated by the Court must be strictly adhered to; that attorneys ought not to substitute one word for another; and that the Court had lately determined that the word "*calleth*," instead of "*voucheth*" to warranty, was a fatal objection (*a*).

The learned Serjeant, therefore, took nothing by his motion.

(*a*) See the case of *Linney, Vouchee*, 12 J. B. Moore, 298, and the note thereto.

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PRICE v. SEVERNE.

In trespass for an assault, the defendant pleaded the general issue. The Jury found a verdict for the plaintiff, and a new trial was directed, on the ground that the damages were excessive. The Court refused to allow the defendant to withdraw the general issue, and plead accord and satisfaction.

THE rule for a new trial in this cause having been made absolute on payment of costs, on the ground that the damages were excessive (*a*), the defendant obtained an order from Mr. Justice *Gaselee*, at chambers, on the 28th instant, to withdraw the plea of the general issue of not guilty, and to plead accord and satisfaction instead thereof.

Mr. Serjeant *Adams* now moved to discharge that order, and submitted, that as the defendant was fully acquainted with all the circumstances of the case when he caused the general issue to be put on the record, he ought

(*a*) See *ante*, page 125.

not to be allowed to withdraw it; and if the Court allow the plea of accord and satisfaction to be substituted, it will harass the plaintiff, as it will raise an entirely new issue. At all events, it is an application to the discretion of the Court, and they will not allow a defendant to substitute a special plea for the general issue, after he has failed on the latter plea.

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Mr. Serjeant *Goulburn*, in support of the order, shewed cause in the first instance, and observed, that the real and only question between the parties was, whether the Jury had not found too large damages for the plaintiff. The Court so considered, when they made the rule absolute for a new trial; and the Lord Chief Justice suggested, that, if the defendant had pleaded accord and satisfaction, it might have been a bar to the action. The Courts have frequently allowed declarations to be amended by adding new counts, and records have been amended even after verdict; and as the new trial was granted on payment of costs, the plaintiff is in the same situation as if he were going down to trial for the first time.

Lord Chief Justice TINDAL.—I am of opinion that this order ought not to have been made. The only complaint by the defendant is, that the Jury have awarded excessive damages to the plaintiff. No new fact appears to have come to the defendant's knowledge since the plea of the general issue was pleaded; but he now wishes to put a new plea on the record, which will raise an entirely different issue, and may have the effect of defeating the action altogether. At all events, it might deter the plaintiff from proceeding further.

Mr. Justice PARK.—I think we should be doing an act of great injustice to the plaintiff, by allowing the defendant to withdraw his plea of not guilty, and to plead accord

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and satisfaction in lieu thereof. Although my Lord Chief Justice suggested that that plea might have been an answer to the action, yet the only ground on which we thought it right to direct a new trial was, that the damages were outrageous and excessive. Although a party may have leave to amend after verdict, yet it is in the discretion of the Court, and allowed or refused according to the peculiar circumstances of the case.

Mr. Justice BOSANQUET.—My brother *Gaselee* was not in Court when we made the rule absolute for a new trial. If he had been present, he would no doubt have refused to make the order, which must be—

Discharged.

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HEWITT v. PIGOTT, Esq.

In an action against the Sheriff for a false return, he produced two deeds at the trial, one of which was read, and the plaintiff admitted the execution of the other, which was not given in evidence. The Jury found a verdict for the plaintiff, and the Court having directed a new trial, the Court allowed the plaintiff to inspect and take a copy of the deed which was read, but not of that which was not given in evidence.

THIS was an action on the case, and brought against the defendant, as Sheriff of the county of *Somerset*, for a false return of *nulla bona* to a writ of *fieri facias* sued out at the instance of the plaintiff against the goods of Lord *Egremont*.

At the trial, before Lord Chief Justice *Tindal* at *Westminster*, at the adjourned Sittings after the last *Trinity* Term, the defendant produced two deeds, the one dated in *May*, 1823, the other in *November*, 1824, by the latter of which, the whole of Lord *Egremont's* effects were conveyed to trustees for the benefit of his creditors. This deed was read, and the plaintiff admitted the execution of the other, which was not given in evidence. The Jury found a verdict for the plaintiff.

Mr. Serjeant *Wilde*, in the last *Michaelmas* Term, obtained a rule *nisi*, that this verdict might be set aside and

a new trial granted, on the grounds of surprise and that the verdict was contrary to the evidence.

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Hewitt
&
Pigott.

Mr. Serjeant *Cross* having shewed cause in the last term, the Court directed a new trial. The learned Serjeant on a former day in this term obtained a rule calling on the defendant to shew cause why he should not permit the plaintiff to inspect and take copies of those deeds, on the ground that, when they were produced at the trial, the plaintiff might have caused them to be read, or, at all events, have made extracts from the deed which was given in evidence; and as the plaintiff admitted the execution of the other, he was now entitled to peruse it, and, if necessary, take a copy, or make extracts from it, on payment of the costs of making such copy.

Mr. Serjeant *Wilde*, now shewed cause.—As only one of the deeds was given in evidence at the trial, the plaintiff cannot be entitled to inspect that which was not read. But both the deeds are the muniments of the defendant, or of the parties who indemnify him in this action; and the plaintiff has not stated that he has had no abstract; and it is an established and recognised principle, that a party cannot be compelled to produce a deed, unless he holds it as a trustee, when he may be bound to furnish a copy by the direction of the Court, in case they should think it necessary that he should do so.

Mr. Serjeant *Cross*, in support of his rule.—The plaintiff is entitled to inspect and take copies of both the deeds, as they were produced at the trial; and although one only was read, yet they must be considered as being before the Court when the rule for a new trial was applied for. The plaintiff had a right to have both deeds read at the trial, or copies furnished him, when the Court granted the new trial; and after the documents had been once produced, they were accessible to both parties.

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Lord Chief Justice TINDAL.—There is a great distinction between the two deeds. The first was read at the trial, and heard by the Judge and the Jury; and when the defendant applied for a new trial, there would have been no injustice in imposing upon him the condition of producing that deed for the inspection of the plaintiff in case the rule should be made absolute. But the second deed was not given in evidence although the plaintiff admitted that it was duly executed. The defendant thought he had sufficient evidence without it. It therefore would not be just that the plaintiff should inspect or have a copy of that deed, as the defendant was not bound to limit or confine his defence to one deed only. It must be considered as one of the defendant's muniments, which the plaintiff has no right to inspect before the second trial; and it appears to me, that justice will be satisfied by the defendant's producing that deed which was read at the trial.

Mr. Justice PARK.—The plaintiff had no right to inspect either of the deeds previously to the trial. That which was given in evidence must be considered as if it were now in Court, and the plaintiff is entitled to inspect and take a copy of it. With respect to the other deed, although the plaintiff admitted its execution, yet it was merely referred to at the trial. It therefore is not incumbent on the defendant to produce it to the plaintiff before the second trial, as we cannot compel a defendant to exhibit his muniments to an adversary before he is bound to give them in evidence in support of his defence.

Mr. Justice BOSANQUET, and Mr. Justice ALDERSON, concurring—

Rule absolute, as to the production of that deed only which had been given in evidence and read at the trial.

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TAYLOR v. THOMPSON.

THIS was an action of trespass, and brought against the defendant, for breaking and entering the plaintiff's close. The plaintiff, having obtained a verdict, entered up judgment, and sued out execution against the defendant. The Prothonotary, on the taxation of costs, having allowed the plaintiff the costs of a view, which had been granted at his instance—

The costs of a view cannot be allowed to the party obtaining it, unless the names of the shewers are inserted in the writ of view.

Mr. Serjeant *Russell*, on a former day in this term (although the Sheriff had levied under the writ, and the defendant had paid the amount of the levy and the costs), obtained a rule *nisi* for the Prothonotary to review his taxation, on an affidavit which stated, that the writ of view directed to the Sheriff did not contain the names of the shewers; and that although the defendant's attorney attended and watched the proceedings, neither he nor the defendant had named or appointed any shewer to be present at the view.

Mr. Serjeant *Wilde* now shewed cause, and submitted that the application was too late, as it was not made until after final judgment signed and execution executed. The defendant might and ought to have applied to the Court, immediately after the Prothonotary had allowed the plaintiff the costs of the view.

Lord Chief Justice TINDAL.—The statute 6 *Geo.* 4, c. 50, s. 23, expressly enacts, that where in any case, either civil or criminal, depending in any of the Courts of record at *Westminster*, it shall appear to any of the respective Courts, or to any Judge thereof, in vacation, that it will be proper and necessary that some of the Jurors who are to try the issues in such case should have the view of the place in question, in order to their better understanding the evi-

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dence that may be given upon the trial of such issues, in every such case, such Court, or any Judge thereof, in vacation, may order a rule to be drawn up, containing the usual terms, and also requiring, if such Court or Judge shall so think fit, the party applying for the view to deposit in the hands of the under-sheriff a sum of money to be named in the rule, for payment of the expenses of the view, and commanding special writs of *venire facias*, *distringas*, or *habeas corpora*, to issue, by which the Sheriff or other minister, to whom the said writs shall be directed, shall be commanded to have six or more of the Jurors named in such writs, or in the panels thereto annexed, at the place in question, at some convenient time before the trial, who then and there shall have the place in question shewn to them by *two persons in the said writs named*, to be appointed by the Court or Judge; and the said Sheriff or other minister who is to execute any such writ, shall, by a special return upon the same, certify that the view hath been had, according to the command of the same, and shall specify the names of the viewers." As, therefore, in this case the names of the shewers were not inserted in the writ, there has been, in fact, no view as required by the statute. It was the duty of the plaintiff to have named the shewers, when he applied for the rule for the view; and, although the defendant might have come earlier, yet the plaintiff could not be entitled to the costs of the view, as he did not comply with the terms of the statute; and the defendant has sworn that neither he nor his attorney had named or appointed any shewer to be present at the view.

The rest of the Court concurring—

Rule absolute.

END OF HILARY TERM.

CASES

ARGUED AND DETERMINED

IN THE

Courts of Common Pleas

AND

Exchequer Chamber,

IN EASTER TERM,

IN THE FIRST YEAR OF THE REIGN OF WILLIAM IV.

JOHN PERMEWAN the Younger v. WILLIAM MITCHELL,
and ELIZABETH, his Wife, and JOHN BILLING.

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THIS was a case directed by his Honour the Master of the Rolls, to be submitted to the Judges of this Court for their opinion on the following facts:—

"*Henry Ellis*, the late father of the defendant *Elizabeth Mitchell*, late *Elizabeth Ellis*, spinster, being seised to him and his heirs of, amongst other hereditaments, certain lands called *Trevorian*, situate in the parish of *Senmen*, in the county of *Cornwall*, duly made and published his last will and testament in writing, dated the 9th *March*, 1804, and which was executed and attested as required by law for devises of real estates of inheritance:

Devise to trustees in trust, of testator's freehold lands in the parishes of *St. J., S., and P.*, for the use of his daughter when she should attain twenty-one, at which time she was to be put into possession, the trustees allowing her, for her maintenance, during her minority, the yearly sum of 25*l.*; but in case she

should die during her minority, or without issue, then to the trustees in trust, to the use of *T. E.* for life, remainder to his first and other sons, and their heirs male; but in case the testator's daughter attained the age of twenty-one and married, then to the trustees, for the use of the first male issue of the daughter lawfully begotten, testator's estate *A.* in the parish of *St. J.*; to the second male issue, his estate *B.* in the parish of *S.*; and to the third male issue, his estate *C.* in the parish of *P.*; on their severally attaining the age of twenty-one, and their heirs male. But should testator's daughter die without male issue, and leave female issue, then to the trustees for the use of the said female issues, and their heirs male; but in failure of male issue, to testator's own right heirs for ever. The testator's daughter attained twenty-one, suffered a recovery, and married:—*Held*, that at the time of her marriage she was entitled to an absolute estate of inheritance in fee-simple in the lands in the parish of *S.*

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and he thereby, after giving to *Alexander Dennis*, *John Fennell*, and *Thomas Ellis*, therein severally named, all his household furniture and stock, upon certain trusts therein mentioned, proceeded as follows:

“ ‘ And all the rest, residue, and remainder of my goods, chattels, bonds, bills, writings, or securities for moneys, which I may have in my possession at the time of my death, I also give unto the before-named *Alexander Dennis*, *John Fennell*, and *Thomas Ellis*, in trust to and for the use, benefit, and advantage of my only daughter *Elizabeth Ellis*, until she shall attain the age of twenty-one years; at which time a true and just account of all moneys paid and received by them shall be rendered her, and she shall be put into possession of all my said goods, chattels, bonds, bills, writings, or securities for moneys. I give, devise, and bequeath unto the said *Alexander Dennis*, *John Fennell*, and *Thomas Ellis*, in trust to and for the use of my said daughter when she shall attain the age of twenty-one years, all my freehold messuages, lands, tenements, hereditaments, and premises, situate, lying, and being in the several parishes of *St. Just*, *Sennen*, and *Paul*, in the aforesaid county of *Cornwall*, and the income arising from the same, from time to time, to be by them laid out and invested in proper and good securities, there to accumulate and increase to and for the use of my said infant daughter *Elizabeth Ellis* during her minority, and to be paid and payable unto her when she attains the said age of twenty-one years; and at which time she is to be put into full and free possession of all my said messuages, lands, and tenements: allowing unto my said daughter for her education and maintenance during her minority, the yearly sum of 25*l.*; but, in case my said daughter shall die during her minority, or die without issue, then, and in that case, I give, devise, and bequeath unto the said *Alexander Dennis*, *John Fennell*, and *Thomas Ellis*, in trust to and for the use of *Thomas Ellis* the younger, son of the said *Thomas Ellis*, one of

the trustees named in this my said will, all my freehold lands, messuages, tenements, and hereditaments as aforesaid, and all my goods, bonds, writings, and chattels whatsoever, which they may have in their custody, on his attaining the age of twenty-one years; to the use of him the said *Thomas Ellis* the younger, and his assigns, during his life, and, from and immediately after his decease, to the use of his first son lawfully begotten, and the heirs male of the body of such son lawfully issuing; and, in default of such issue, to the use of his second, third, fourth, fifth, sixth, and seventh sons, and the heirs male of their bodies issuing, the eldest of such sons to be preferred before the youngest, and the heirs male of their bodies issuing; and, in failure of such male issues as aforesaid, to my right heirs for ever. But, in case my said daughter attains the age of twenty-one years, and happens to marry, then I give, devise, and bequeath unto the said *Alexander Dennis*, *John Fennell*, and *Thomas Ellis*, for the use of the first male issue, to be begotten lawfully on her body, my estate of land called *Trevedra*, situate in the parish of *St. Just*; and to the second male issue to be begotten as aforesaid, my estate of land called *Trevorian*, in the parish of *Senner*; and to the third male issue, my freehold premises which I have in the village of *Mousehole*, in the parish of *Paul*, on their severally attaining the age of twenty-one years, and the heirs male of their several bodies lawfully issuing; permitting my said daughter to receive the incomes arising therefrom to her own use during their several minorities, and the male issue paying unto my said daughter during her life an annuity or yearly sum of 15*l.*, clear of all outgoings, out of my said estate of *Trevedra*, with power of distress for non-payment. But, should my said daughter *Elisabeth Ellis* die without male issue, and leave female issue or issues, then I give, devise, and bequeath unto the said *Alexander Dennis*, *John Fennell*, and *Thomas Ellis*, and the survivors of them, all my said freehold messuages, lands, tenements, and hereditaments,

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goods, and chattels whatsoever, for the use of the said female issues, share and share alike, both in respect to freehold and chattel effects, and the heirs male of their several bodies issuing; but, in failure of male issue or issues, to my own right heirs for ever.'

" The testator died seised of the said several messuages and hereditaments so devised as aforesaid, shortly after the date of his will, without having revoked or altered the same, leaving his daughter *Elizabeth Ellis*, then an infant, his only child and heiress-at-law.

" The said *Elizabeth Ellis* attained her age of twenty-one years some time previously to the year 1814.

" By indentures of lease and release, dated respectively the 11th and 12th of *January*, 1814, the release being of three parts, and made between *Elizabeth Ellis* of the first part; *John Philpot* of the second part; and *Edward Coode* the younger, of the third part; it was witnessed, that, for the purpose of barring all entails in the said premises, and for the nominal consideration therein mentioned, the said *Elizabeth Ellis* released unto the said *John Philpot* and his heirs, all the said messuages and premises devised by the will of the testator, to hold the same unto and to the use of the said *John Philpot* and his heirs, to the intent that a recovery should be duly suffered of the said premises, in which the said *Edward Coode* should be demandant, and the said *John Philpot* tenant, who should vouch the said *Elizabeth Ellis*, who should vouch over the common vouchee; which said recovery, it was thereby agreed, should enure to the use of the said *Elizabeth Ellis* and her heirs.

" Pursuant to the said indentures of lease and release, and in manner therein agreed upon, a common recovery of the said premises was duly suffered in *Hilary* Term, 1814. The said *Elizabeth Ellis* intermarried with the defendant *William Mitchell* in *January*, 1815."

The question for the opinion of the Court was—" Whe-

ther the defendant *Elizabeth Mitchell* was, at the time of the marriage, entitled to an absolute estate of inheritance in fee-simple in the said lands called *Trevorian*?"

The case came on for argument in the course of the last term.

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Mr. Serjeant *Russell*, for the plaintiff.—The defendant, *Elizabeth Mitchell*, only took an estate for life in the lands called *Trevorian*, under her father's will, and therefore she could not acquire the fee by the recovery which was subsequently suffered, and which can have no operation at law. The Court must look at the whole of the will, the language of which is obscure and open to doubt. The allowance of 25*l. per annum*, to *Elizabeth Ellis* during her minority, only gave her an estate for life; and if she took an estate tail, it can only be by force of the words which immediately follow, *viz.* "but in case my said daughter shall die during her minority, or die without issue, then I give and devise unto the trustees, in trust for *Thomas Ellis* the younger, &c." Although it may be said, that the word *or* must be construed as *and*, according to the case of *Fairfield d. Hawkesworth v. Morgan* (a), and that the words "die without issue" are words of limitation, and enlarge the life estate into an estate tail; still the Court must look at the whole of the will, in order to arrive at the intention and object of the testator. So, although the word *issue* has been deemed equivalent to heirs, yet in *Doe d. Cooper v. Collins*, Lord *Kenyon* said (b)—"The position to be collected from all the cases is, that, in a will, 'issue' is either a word of purchase or of limitation, as will best answer the intention of the devisor; though, in the case of a deed, it is universally taken as a word of purchase." There, the testator devised all his lands to his wife for her life, and, after her decease, to his daughters *Eleanor* and *Susannah*, to be equally divided between them, not as joint tenants,

(a) 2 New Rep. 38.

(b) 4 Term Rep. 299.

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but as tenants in common; and then he proceeded to shew how their issue should take, *namely*, the one moiety to his daughter *Eleanor* and her heirs for ever, and the other moiety to his daughter *Susannah*, for life, and, after her decease, to the issue of her body lawfully begotten; and their heirs for ever; and the Court held, that the devisor used 'issue' as a word of purchase, because, if the devise of the second moiety were construed to give an estate tail to *Susannah*, the devisor's estate would not be equally divided; for then the ultimate reversion of the second moiety would be again sub-divided between the heirs of the two daughters, and *Eleanor* and her heirs would take a moiety of this reversion over and above what they took under the devise of the first moiety of the whole. *Susannah*, therefore, took only an estate for life, with remainders to her children, as purchasers; and Lord *Kenyon* said—"In some cases, such as *Doe d. Long v. Laming* (a), the words 'heirs of the body,' have been restrained in this way; and they always give way with greater difficulty than the word 'issue'." The question then is, how the word 'issue' was meant to be used by the testator in this case? It must be taken and read as though the word 'children' had been introduced; and 'male issue,' in the latter part of the will, is used as a description of the person. In case *Elizabeth Ellis* attained twenty-one and married, the testator devised his three estates to the trustees, in trust, the first, for the first male issue of his daughter *Elizabeth*; the second, for the second male issue; and the third, for the third male issue: which clearly shews that the testator meant children. In *Goodright d. Docking v. Dunham* (b), where the devise was to *Jeffery Laming* for his life, and, after his death, unto all and every his children equally, and to their heirs; and, in case he died without issue, then over; it was admitted, and so taken by the Court, that issue meant the same as children, and would not convert the es-

(a) 2 Burr. 1100.

(b) 1 Doug. 264.

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tate for life to *Jeffery*, into an estate tail. So, in *Ludington v. Kime* (a), where the devise was to *Evers Armyn* for life, without impeachment of waste; and in case he should have any issue male, then to such issue male and his heirs for ever; and if he should die without issue male, then over; it was held, that *Evers Armyn* only took an estate for life, and that his issue, if he had any, would have taken a fee by purchase; and that the devisor used 'issue' as a description of the person, because he added a further limitation to the issue, *viz.* and to the heirs of such issue for ever. So, here, a further limitation is added to the male issue; as the testator directed, that, if his daughter should die without male issue, and leave female issue, the trustees should take the estates for the use of the said female issue, and the heirs male of their bodies issuing. Although if the will had stopped at the words 'die without issue,' after the allowance for the education and maintenance of *Elizabeth Ellis* it might be considered as a dying without issue generally; yet, by the subsequent part of the will, it is clear, that dying without leaving issue, and without leaving the particular issue there mentioned, namely, the first, second, and third male issue, and there female issue was contemplated. The will, therefore, must be read as if the word 'children' had been introduced: and, if the Court were to hold that *Elizabeth Ellis* took an estate tail, it would destroy the manifest intention of the testator to divide the three estates among her first, second, and third male issue. But, it may be said, that the recovery suffered by *Elizabeth Ellis* destroyed the contingent limitations or remainders to her children. But these limitations are conditional only, and in the nature of an executory devise, which could not be destroyed. It is a well-known and established rule, that where a particular estate of freehold is first devised, capable in its own nature of supporting a

(a) 1 *Ld. Raym.* 203.

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remainder, followed by a limitation which is not immediately connected with, or does not immediately commence from the expiration of the particular estate of freehold, the latter limitation is incapable of taking effect as a remainder, but may operate as an executory devise, if confined to the requisite limits of time (a); and, here, the daughter's particular estate would not support the subsequent estates to the children, because it ceased on her attaining the age of twenty-one years and marrying, whereas, the estates of the children could not vest in them, or in their trustees for them, until they were born. The limitation, therefore, to the children, must be taken as an executory devise; and, it is an established principle, that an executory devise cannot be prevented or destroyed by any alteration whatsoever in the estate out of which or after which it is limited. The limitations, therefore, are not affected by the recovery; and there was an existing estate in the trustees, at the time it was suffered, to support the estates of the children, although the Court should be of opinion that the limitations to them must be considered as contingent remainders.

Mr. Serjeant *Wilde, contra*.—The defendant, *Elizabeth Mitchell*, either took an estate tail by implication, or at the time of her marriage was entitled to an estate of inheritance. It is a general rule in the construction of wills, that general words in one part may be restrained by subsequent words, and shall be so construed as not to defeat the intention of the testator, where such intent can be collected from any other part of the instrument. So, where the subordinate or particular intent is at variance with the general or paramount intent, the latter must prevail; and here, it is quite clear that the testator did not intend that the estate should go over, until after a general or total failure

(a) Fearn on Contingent Remainders, 6th Edit. 397.

of issue of his daughter *Elizabeth*. There are no words of limitation in the first devise to the daughter, nor is there any *hiatus*, so as to induce the Court to consider it as an executory devise; and it is an established principle, that a limitation cannot operate as an executory devise, if it can take effect as a contingent remainder. Here, the limitations need not be taken in the precise order in which they are set down, and if the intermediate devise to *Thomas Ellis* be omitted, or read last, it will get rid of the apparent obscurity; and it is immaterial whether or not the daughter took an estate for life defeasible on her marriage, as the remainder was expectant on her life estate, which she destroyed by suffering the recovery, there being then no person *in esse* to take under the limitations, and she took as heir to her father. The general and paramount intent of the testator was, to give his daughter an estate tail; and the estate was not to go over to *Thomas Ellis*, while the daughter had any issue in existence; and if the Court should hold that she only took an estate for life, such issue might be wholly unprovided for.

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Mr. Serjeant *Russell*, in reply.—The general intent of the testator was, that the estates should go to the three first male children of his daughter, if she should have so many; if none, then to her female issue; and that intent would be destroyed or defeated, if the Court should hold that the daughter took an estate tail. But as she only took an estate for life, the recovery cannot operate; and it is unnecessary to consider whether the limitations operated as a contingent remainder. The trustees are not a party to the recovery; and if the Court should be of opinion that the estate commenced before *Elizabeth Mitchell* had any children, it began when she attained the age of twenty-one.

Cur. adv. vult.

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The following certificate was afterwards sent to his Honour the Master of the *Rolls*.

This case has been argued before us by counsel. We have considered it; and are of opinion that the defendant, *Elizabeth Mitchell*, was, at the time of her marriage, entitled to an absolute estate of inheritance in fee-simple, in the said lands called *Trevorian*.

N. C. TINDAL.

J. A. PARK.

J. B. BOSANQUET.

E. H. ALDERSON.

Saturday,
April 16th.

THURGOOD v. RICHARDSON and Another, Sheriff of *Middlesex*.

In an action by a landlord against a Sheriff, for removing, under an execution, the goods of his tenant, without reserving him a year's rent, as required by the statute 8 *Ann* c. 14, the tenant was called as a witness, to prove the rent due; and, on his being objected to on the ground of interest, the landlord gave him a general release:—*Held*, that the landlord was not thereby precluded from recovering against the Sheriff the amount of the rent, as it was the misconduct of the Sheriff in not reserving the rent, which made the release necessary.

THIS was an action on the case, and brought against the defendants, as Sheriff of *Middlesex*, for levying on and removing the goods of one *Perry*, who occupied part of a house as tenant to the plaintiff, under an execution sued out against *Perry*, at the suit of one *Mitchelmore*, without satisfying or retaining for the plaintiff a year's rent, which he, *Perry*, told the defendants' officer was due and in arrear from him to the plaintiff before the removal of the goods. The first count of the declaration stated, that, on the 25th of *March*, 1830, and for the space of one year then last past, one *John Perry* held, used, occupied, and enjoyed certain rooms and apartments *in and parcel of a certain messuage* or dwelling-house, with the appurtenances, in the parish of *St. Pancras*, as tenant thereof to the plaintiff, at and under a certain rent or sum of money therefore payable

by *Perry* to the plaintiff for the same; that theretofore, to wit, on &c., the sum of 36*l.* for and on account of the rent so payable by *Perry* to the plaintiff, for the said rooms and apartments, for a long time, to wit, for one year of the said tenancy, ending on the 25th *March*, 1830, became and was due and payable, and continually from thence hitherto had been and still was in arrear and unpaid; that the said sum of 36*l.* of the rent so being in arrear and unpaid by *Perry* to the plaintiff, afterwards, to wit, on the 7th *May*, 1830, the defendants then being Sheriff of *Middlesex*, by virtue and under pretence of a writ of *fiery facias* against *Perry*, at the suit of one *G. H. Mitchelmore*, out of the Court of *King's Bench* before that time sued forth and prosecuted, and directed to the defendants as such Sheriff, seized and took the goods and chattels of *Perry*, then being in the said rooms and apartments, in the tenure and occupation of *Perry*, as tenant thereof as aforesaid, to a large amount, to wit, beyond the amount of the said arrears of rent so due and owing from *Perry* to the plaintiff, that is to say, to the amount of 40*l.* The plaintiff then averred, that after the taking of the said goods and chattels so being in the said rooms and apartments, and before the removal of the same, under pretence of the said writ, to wit, on &c., the plaintiff gave notice to the defendants, so being Sheriff as aforesaid, of the aforesaid rent so being due and in arrear to the plaintiff from *Perry*, and requested the defendants that he the plaintiff might be paid his rent so due, in arrear and unpaid, before the said goods and chattels, or any part thereof, should be removed from or out of the said rooms and apartments; yet the defendants, well knowing the premises, but not regarding the duty of their said office, nor the statute in such case made and provided, but contriving, &c. to deceive and defraud the plaintiff in that respect of the said rent so due to him as aforesaid, and of his, the plaintiff's, remedy for the recovery thereof, under colour and pretence of the said

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writ, to wit, on &c., wrongfully, injuriously, and deceitfully removed and carried away the said goods and chattels so taken as aforesaid, from and out of the said rooms and apartments so holden by *Perry*, contrary to the form of the statute in such case made and provided (a), without paying or satisfying the plaintiff the said rent so due and owing and in arrear to him as aforesaid, or any part thereof. The plaintiff then averred, that he had not at any time since been paid or satisfied the said rent, or any part thereof, but that the same and every part thereof was due, in arrear and unpaid from *Perry* to the plaintiff, whereby the plaintiff had been and was deprived of the benefit of a distress for the recovery and satisfaction of the said rent so due and owing to him from *Perry*, and was in great danger of losing the same. To this was added a count in trover. The defendants pleaded the general issue.

At the trial, before Lord Chief Justice *Tindal*, at *Westminster*, at the sittings after the last term, the plaintiff proved that he was lessee for a term of years of the house in which the goods were seised, and that he underlet two rooms to *Perry*, who owed him 36*l.* for a year's rent. On *Perry* being called as a witness for the plaintiff, to prove that he occupied under him, and that the rent was due, it was objected for the defendant, that his testimony was inadmissible; upon which the plaintiff executed a general release, which was handed to the witness, the Jury having been previously sworn. His evidence was then received, and he having proved that his arrears of rent amounted to 36*l.*, being a year's rent, and that he was on the premises when the defendants' officer entered, and that he told him he owed the plaintiff a year's rent—the Jury found a verdict for the plaintiff, damages 36*l.*, being the amount of the rent due. His Lordship, however, reserved leave to the defendants to move to set aside the verdict, and to enter a verdict for

(a) 8 Anne, c. 14.

nominal damages instead thereof, on the ground that the plaintiff, having released his demand on his tenant *Perry* for rent, he had no longer any claim against the defendants as Sheriff.

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Mr. Serjeant *Edward Lawes*, now moved accordingly, and submitted, that as the plaintiff had given his tenant a release of the rent due, it was equivalent to a payment by the latter of the amount into Court; in which case it is quite clear that the plaintiff could not be entitled to sue the defendants for damages for not having reserved the rent for him in the first instance.

Lord Chief Justice TINDAL.—It seems to me that there is no ground for this application. The action was brought by a landlord against the Sheriff, for an alleged breach of duty, and non-compliance with the statute 8 *Anne*, c. 14, in not reserving for the landlord a year's rent upon an execution levied against his tenant. As the defendants have been guilty of a breach of duty in their character of Sheriff, it is clear that they are answerable to the plaintiff in damages. If, indeed, the tenant had, subsequently to the action, gone to his landlord and paid the rent, the latter would be entitled to nominal damages only. But the question is, whether a release given to the tenant, on his being called as a witness for his landlord, after the Jury were sworn, is equivalent to the payment of rent. The substance of the transaction must be looked at, which is this. It was the misconduct of the defendants which compelled the plaintiff to give the release, and his giving it did not prejudice the defendants, as Sheriff, in any respect; but, as the plaintiff was obliged to give it, and he could not afterwards recover the rent from his tenant, I think that the giving the release cannot be deemed equivalent to payment of the rent; and, consequently, that there is no ground to reduce the

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damages which the Jury properly assessed as the amount of the rent due.

Mr. Justice PARK.—The defendants compelled the plaintiff to give the release; and if he had not done so, his tenant would have been an incompetent witness to prove that any rent was due from him to his landlord at the time of the seizure by the defendants.

Mr. Justice GASELEE and Mr. Justice ALDERSON concurring—

Rule refused.

SAME v. SAME.

The first section of the statute 8 *Anne*, c. 14, is not to be limited to the case of an original demise of entire premises, but applies to a sub-lessee, and to goods taken in execution in apartments being parcel of a messuage.

MR. Serjeant E. Lawes then moved, that the judgment might be arrested, on the ground that the first section of the statute 8 *Anne*, c. 14, which directs the Sheriff to satisfy a landlord a year's rent when the goods of his tenant are taken in execution, applies only to the case of an original lessor and lessee, and not to an under-lessee, or sub-tenant; and here, the plaintiff has shewn by his declaration, that his sub-lessee merely occupied *part* of the house; and if the Court were to hold that the statute could be so far extended, a lessee, by sub-letting each apartment to a different occupier, might defeat as many executions as he had rooms in his house. In *Hoskins v. Knight (a)*, although it was contended that the statute of *Anne*, being a remedial act, ought to be construed liberally for the benefit of the landlord, yet the Court held, that there was nothing which required it to be extended beyond the literal meaning of the enacting clause,

(a) 1 Mau. & Selw. 246.

which in this case must be taken to apply only to an entire dwelling; and the word 'tenements' cannot be extended to rooms or apartments, or distinct parcels of a messuage or house.

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Lord Chief Justice TINDAL.—The original lessor could only be entitled to the rent of the whole house, although let out in separate rooms or apartments. It would be a very narrow construction of the statute, which is a remedial act, if we were to restrain it to the case of an original demise of an entire house or messuage. The object of the statute was the better security of landlords, and to prevent frauds committed by tenants. Large houses are frequently divided into several tenements; and here, although it appears, on the face of the declaration, that the plaintiff's lessee only occupied two rooms or apartments of the house, yet the Jury were satisfied that it was a separate and distinct holding; and there is no pretence for saying that the reserving to the plaintiff his year's rent would be a hardship on the judgment-creditor, as the plaintiff's tenant was only bound to contribute his proportion of the rent for the apartments he occupied, and not of the whole messuage; and it appeared that 36*l.* were due to the plaintiff for the rent of the rooms in question.

The rest of the Court concurring—

Rule refused.

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Monday,
April 18th.

A book was kept by the steward of a manor, in which he entered the assessments of all fines, as well those which were paid, as those which were unpaid, but the steward made out a second book at the end of each year, in which he entered the fines which he had received:—
Held, that the first book was not admissible in evidence for the lord of the manor, to shew what fines had been paid.

Dean and Chapter of ELY *v.* CALDECOTT.

THIS was an action of *assumpsit* for fines payable to the plaintiffs by the defendant, on his admission to certain copyhold premises.

At the trial, before Mr. Justice *Alderson*, at the last Assizes at *Bury St. Edmonds*, the question was, whether, by the custom of a manor of which the plaintiffs were lords, a fine having been paid by a tenant for life on his admission to a copyhold estate within the manor, another fine was payable by the remainder-man on his admission to the same property, after the death of the tenant for life. The present action was brought against the defendant as remainder-man; and the plaintiffs, in order to prove the payment of fines by remainder-men, offered in evidence a book which was in the possession of the steward of the manor, and who, on producing it, stated that he had received it from his predecessor in 1798, and that it had ever since been kept with the other muniments of the plaintiffs as lords of the manor. But it appeared that the book contained entries of the assessments of all fines, whether paid or not, and that, at the end of every year, the steward made up a second book, in which he entered the fines he had received.

The learned Judge refused to receive this book in evidence, as it did not appear that the stewards had made any entries to charge themselves, no distinction being made between the fines which they had received, and those that were not paid. The Jury, however, found a verdict for the plaintiffs; and, as several points of law were raised, it was consented that the facts should be turned into a special case, for the purpose of obtaining the opinion of the Court.

Mr. Serjeant *Storks*, wishing to have entries from this

book introduced into the case, now applied on the part of the plaintiffs, that the verdict found for them might be set aside, and a new trial had, on the ground that the book had been improperly rejected, as it was an ancient book containing entries from 1735 to the present time, and came from the proper custody; and the tenants of the manor could only ascertain the amount of the different assessments, by inspecting the book, to which they had access. The book was handed down from steward to steward, and was in the nature of a public writing or document. Besides, it was a record of the proceedings of the Court of the lords of the manor, and was evidence against the stewards in an action by the lords. Besides, the book contained entries adverse to the interest of the stewards, as those assessments which were entered as having been received they were bound to account for, and the book was the only evidence of the amount of the assessments. In *Barry v. Bebbington (a)*, where the point in issue was, whether a certain waste was the soil of the defendant, entries by a steward, since deceased, of money received by him from different persons, in satisfaction of trespasses committed on the waste, were admitted in evidence to shew that the right to the soil was in his master, under whom the plaintiff claimed; and Lord *Kenyon* said: "It is clear, that, where a steward charges himself with the receipt of money, it shall be received in evidence before a Jury to shew that such sum was received by him;" and here, the entries by the stewards in the book in question were admissible in evidence to charge them with the amount of the assessments which they acknowledged they had received.

Lord Chief Justice TINDAL.—I am of opinion that the book in question was properly rejected at the trial. It appeared to be a book in which entries were made by the

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(a) 4 Term Rep. 514.

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stewards of the manor, of assessments of fines, as well of those which were paid, as of those which were unpaid; and the plaintiffs proposed to give it in evidence, in order to prove the payment of fines by remainder-men, on their admission after the death of tenants for life. But, if the book had been admitted, how could the Jury say whether the fines had been paid or not? The evidence as to payment was conjectural only; neither did the book contain entries by which the stewards had charged themselves, for it appears that each steward made out, at the end of every year, a second book, in which he inserted the fines that had been actually paid, and gave credit for them accordingly. Now, it appears to me that it would be highly dangerous to admit the book in question, for, if it were admissible, a steward might, by a series of entries, increase the extent of the tenants' liability, by converting a customary into an arbitrary fine, at the will of the lord.

Mr. Justice PARK.—I am of the same opinion. The book contained entries of fines which were not paid, as well as of those which were paid. That was no evidence that the fines had been actually paid. The book, therefore, was properly rejected.

Mr. Justice GASLER.—The book only contained entries as to the sums assessed for fines, and there was no entry to shew that such fines had been actually paid.

Mr. Justice ALDERSON.—I thought the book was not admissible upon principle, as it only contained the private accounts of the stewards, and the entries of the assessments of fines, and such entries were made whether the fines were paid or not. Besides, the stewards did not charge themselves, as they made out another book at the end of each year, in which they inserted the fines which had been actually received.

Rule refused.

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MOLLOY v. DELVES.

Monday,
April 18th.

THIS was an action by the plaintiff, as indorsee, against the defendant, as the acceptor of a bill of exchange. The plaintiff in his declaration alleged, that one *John Galpin*, on the 13th *April*, 1830, according to the usage and custom of merchants, made his certain bill of exchange in writing, bearing date the day and year aforesaid, and thereby requested the defendant, four months after the date thereof, to pay to him, *Galpin*, or his order, the sum of 75*l.*, for value received; that the defendant afterwards accepted the bill, and that *Galpin* indorsed it to the plaintiff.

In an action by the indorsee against the acceptor of a bill of exchange, the declaration alleged, that one *J. G.* drew the bill, which the defendant afterwards accepted; it was proved that the defendant accepted the bill in blank, and before the drawer had signed his name to it:—*Held*, to be no variance.

At the trial, before Lord Chief Justice *Tindal*, at *Westminster*, at the Sittings after the last term, a witness proved that the defendant's acceptance was written across the bill before it was filled up, and that the drawer's name or signature was not then upon the bill. For the defendant, it was objected that the bill was not drawn according to the custom of merchants. The Jury, however, found a verdict for the plaintiff, for the amount of the bill.

Mr. Serjeant *E. Lawes* now applied for a rule *nisi* that this verdict might be set aside and a nonsuit entered, on the ground of a variance between the declaration and proof; the allegation being that the defendant accepted the bill *after* it was drawn, whereas the name of the drawer was not then written upon it, nor was the body of the bill filled up; and it was incumbent on the plaintiff to declare on the bill according to the fact.

Lord Chief Justice *TINDAL*.—This being an action against the defendant, as the acceptor of the bill, he is estopped from saying that he accepted it before it was drawn.

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Mr. Justice GASELEE.—It has been decided, that, if a bill or note is issued with a blank for the payee's name, any *bond fide* holder may insert his own name as payee; and that, if a person sign his name upon a blank paper stamped with a bill stamp, and deliver it to another to draw such bill as he may choose thereon, he is the drawer of any bill such person shall draw thereon to which the stamp is applicable. So, if a person accept a bill in blank, such acceptance is good, and renders him liable to a *bond fide* holder.

Rule refused (a).

(a) See *Cruchley v. Clarence*, 2 *Randall*, Bayley on Bills, 4th ed. Mau. & Selw. 90; *Cruchley v.* 31; *Collins v. Emett*, 1 Hen. Bl. Mann, 5 Taunt. 529; *The King v.* 313.

Wednesday,
April 20th.

COLLINS and two Others v. GWYNNE.

By the assessed tax act, 43 Geo. 3, c. 99, s. 13, it is enacted that the collectors shall give security to the commissioners for duly paying such monies as shall come to their hands, and for duly demanding the sums assessed, and for duly enforcing the act against defaulters; and by the land-tax act, 38 Geo. 3, c. 5, s. 21, the collectors are required to give security to the

THIS was an action of debt on the following bond:—

“ Know all men by these presents, that we, *Richard Bigg*, the younger, of the parish of St. *Matthew*, *Bethnal Green*, in the county of *Middlesex*, coal-merchant; *Samuel Cardozo*, of the same place, gentleman; and *Lawrence Gwynne*, of *Teignmouth*, in the county of *Devon*, doctor of laws, are jointly and severally held and firmly bound to *James Collins*, *John Burnell*, and *Joseph Merceron*, Esquires, three of the commissioners appointed, among others, for putting in execution the several acts of Parliament made and now in force, for granting an aid to his Majesty by a land-tax for the service of the year 1828, and for granting to his Majesty the several rates and duties of assessed taxes, acting in and for the *Tower* division, within the said

commissioners for duly paying to the receiver-general the sums collected by them. The defendant was sued on a bond containing these conditions, and also a condition to render an account, and pay the sums collected to the commissioners:—*Held*, that the latter condition did not vitiate the bond.

county of *Middlesex*, in the penal sum of 4048*l.* of lawful money of *Great Britain* current in *England*, to be paid to the said *James Collins*, *John Burnell*, and *Joseph Merceron*, some or one of them, their, some or one of their certain attorneys, executors, administrators, or assigns; for which payment well and truly to be made, we bind ourselves, and each of us by himself, for the whole, our and every of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals.

Dated the 27th day of *August*, 1828."

The Defendant having craved *oyer* of the condition of the bond, it was set out as follows:—

"Whereas the above-bounden *Richard Bigg* hath been duly nominated and appointed by the commissioners appointed for putting in execution the said acts of Parliament within the said division and county, one of the collectors of the rates and duties above mentioned, rated, laid, and assessed upon the parish of *St. Matthew, Bethnal Green*, in the *Tower* division, in the county of *Middlesex* aforesaid, for the year 1828, ending respectively the 25th day of *March* and the 5th day of *April*, 1829:— Now, the condition of this obligation is such, that, if the above-bounden *Richard Bigg* do and shall well and faithfully *demand* and collect all and every the sum and sums of money in the said assessments charged and specified, of the respective persons from whom the same shall or may be payable, and shall and do, in case of non-payment thereof, duly *enforce* the powers of the said acts against such persons who may make default therein, and also well and truly *pay*, or cause to be paid, unto the receiver-general of the said taxes, rates, and duties for the said county of *Middlesex*, all such sum and sums of money as shall come to the hands of the said *Richard Bigg*, as such collector, upon the days and at the times by the said acts appointed for the payment thereof, and according to the true intent and meaning of the said acts; and also do and shall, when

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thereunto required, at such times and places as shall be appointed for that purpose, give and render, or cause to be given and rendered, unto the commissioners appointed or to be appointed to put the said acts in execution, or to any two of them, a just and true account in writing of all such sum and sums of money which he the said *Richard Bigg* shall have collected and received by virtue or on account of the said assessments, and shall forthwith *pay* and deliver the same unto the said commissioners, or any two of them, or unto such persons as they or any two or more of them shall appoint, then this obligation to be void, or else to remain in full force and effect."

The breaches assigned were, that *Bigg* did not demand and collect the sums in the assessments charged and specified, of the respective persons from whom the same were payable; that he did not enforce the powers of the acts against certain persons who made default therein; and, that he did not pay to the receiver-general of the taxes, rates, and duties, such sums as came to the hands of *Bigg*, as collector, or give and render to the commissioners a just and true account of the sums which he, *Bigg*, had collected and received by virtue or on account of the said assessments.

The defendant pleaded several special pleas—among others, that the plaintiffs had not been in anywise damnified; and that, if the plaintiffs had been damnified, they were damnified of their own wrong. To these pleas the plaintiffs filed a special demurrer, and the defendant joined in demurrer.

The case now came on for argument.

Mr. Serjeant *Taddy*, in support of the demurrer.—The bond set out on the record is not an indemnity bond, and therefore the pleas cannot be supported. In *Williams's* edition of *Saunders* (a), it is said—"In all cases of condi-

(a) 1 Wms. Saund. 117, n. 1.

tions to indemnify and save harmless, the proper plea is *non damnificatus*; and, if there be any damage, the plaintiff must reply it. This plea, however, cannot be pleaded where the condition is to discharge or acquit the plaintiff from such a bond, or other particular thing, for there the defendant must set forth affirmatively the special matter of performance. But it is otherwise where the condition is to discharge and acquit the plaintiff from any damage by reason of such bond or other particular thing, for that is in truth the same thing with a condition to indemnify and save harmless;" and several authorities are referred to in support of that distinction. The 13th section of the statute 43 *Geo.* 3, c. 99, which was passed for consolidating certain provisions contained in former acts relating to the duties under the management of the commissioners for the affairs of taxes, requires the collectors to give security for three specific purposes—*first*, for their duly paying such monies assessed as shall come to their hands—*secondly*, for the duly demanding the sums assessed—and *thirdly*, in case of non-payment thereof, for their duly enforcing the powers of the act against defaulters. The condition of this bond is framed in compliance with the act; and, although *Bigg* is directed to render an account in writing of all sums which he shall have collected and received on account of the assessments, *and pay and deliver the same* to the commissioners, or such persons as they shall appoint; yet the latter part of the clause was inserted by mistake, and will not vitiate the whole of the bond. It is merely an expansion of what may be fairly implied, for it was the duty of the collector to render an account in writing to the commissioners when required so to do. The 39th section of the statute empowers the commissioners quarterly, or twice in a year at least, to call the collectors before them, and examine them upon oath as to the sums collected by them and paid to the receiver-general; and, by the 40th section, collectors neglecting their

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duty may be dismissed, and the commissioners may appoint others in their stead. The condition, therefore, does not exceed the powers given by the act, and the bond is, at all events, good for that part which the statute requires to be done, and is not void *in toto*, but for the excess only. In *Collins v. Blantern* Lord Chief Justice *Wilmut* said (a): "The Judges formerly thought that an act of Parliament might be eluded if they did not make the whole void if part was void; it is said the statute is like a tyrant, where he comes he makes *all* void, but the common law is like a nursing father, making only void that part where the fault is, and preserves the rest;" and, in *Norton v. Simmes* (b), where a bond was given by an under-sheriff to the Sheriff, conditioned for the performance of covenants, it was resolved, that, though one of the covenants was void in law, yet the bond was good for the rest of the covenants agreeable to law; and a difference was taken between a bond made void by statute and by common law; for a statute is a strict law, but the common law doth divide according to common reason, and, having made that void that is against law, lets the rest stand.

Mr. Serjeant *Wilde, contra*.—The bond is void upon the face of it. The obligees describe themselves as commissioners for putting in execution the land-tax act, and also the act for granting to his Majesty the several rates and duties of assessed taxes. These are two distinct statutes, and relate to different branches of the revenue; and commissioners acting in execution of the one are not empowered to carry the other into effect. The defendants should have required two separate bonds, as the regulations for collecting land-tax and the assessed-taxes are made under the direction of different boards; and the conditions and the amount of the penalty imposed on collectors

(a) 2 Wils. 351.

(b) Hobart, 14.

by the land-tax act differ materially from those imposed by the assessed-tax act, which reduces and consolidates certain provisions contained in former acts relating to such taxes; and by the first section, the land-tax is expressly excepted. The 13th section empowers the commissioners to take a bond in a penal sum, and with a condition thereto to the effect before mentioned: and the penal sum must be equal to the amount of the whole duty to be collected. The 21st section of the land-tax act (a) directs that the collectors shall give security to the commissioners equal to the amount of the whole rate, for duly paying to the receiver-general such money as shall come to their hands; and here, the bond is conditioned for the collector to pay and deliver over the sums he shall have collected to the commissioners, instead of to the receiver-general. The bond, therefore, is not warranted by the statute, and the plaintiffs cannot avail themselves of it in their character of commissioners: they could not take it in their individual capacity, and they have described themselves in the body of the instrument as commissioners acting under both statutes. Besides, the receiver-general gives a security to the public, whilst the commissioners give none. By the 39th section of the statute 43 Geo. 3, c. 97, the collectors are required to pay the sums collected by them to the receiver-general; it would be, therefore, a breach of duty if *Bigg* had paid the sums collected to the commissioners, as he bound himself by the condition of the bond to do. The 48th section expressly directs the collectors to pay the amount of the duties collected to the receiver-general or his deputy; and the 54th directs receivers-general to pay the moneys received by them into the Court of *Exchequer*. The collectors are mere ministerial officers, and a bargain between them and the commissioners to pay to the latter the sums collected, is a breach of a public duty in both

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(a) 38 Geo. 3, c. 5.

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parties. The bond, therefore, is void, and cannot be supported at law.

Mr. Serjeant *Taddy*, in reply.—The bond is a valid and legal bond. The commissioners therein named were empowered to put in execution the land-tax act as well as the statute for the collection of the assessed taxes; and, although the land-tax is excepted in the 43 *Geo.* 3, yet one set of commissioners may administer the duties required by both these statutes. By the 13th section, the collectors are to give a bond to the commissioners if required to do so; and the Court will not assume that they have exceeded their authority as to the amount of the security they required: and, although the bond is conditioned for the payment to the commissioners instead of the receiver-general, yet, if one part of the condition, which is distinct, and may be separated from the rest, be bad, it does not render the whole of the bond void, but only avoids it for the excess, according to the distinction taken in the cases of *Collins v. Blantern* and *Norton v. Simmes*.

Lord Chief Justice TINDAL.—It appears to me that judgment must be entered for the plaintiffs on these pleas. The question does not turn so much on the form of the pleas, as on the bond; and the only point we have to consider is, whether or not it be a legal instrument. It is a well known and established rule, that, if an obligation or bond is conditioned for the performance of a thing which is *malum in se*, or against a statute or positive enactment, not only is the condition void, but the bond or obligation also. Is then the condition of this bond for the performance of a thing *malum in se*, or contrary to the statutes by virtue of which it was taken? If the only condition had been to pay to the commissioners, or such persons as they should appoint, the result would have been altogether different, as it would have imported an illegal act, and the

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bond would have been void. But it is unnecessary to consider that question, because there is a previous and separate clause or condition by which the collector is bound to pay to the receiver-general all such sums as shall come to *Bigg's*, the obligee's, hand, as collector, upon the days and at the times by the acts appointed for the payment thereof, and according to the true intent and meaning of those acts. Now, where there are separate parts of a condition, each of which is distinct in itself, I cannot see why we are to call in aid that part which is illegal, to vitiate that part which is legal. The amount of the penalty prescribed by the statute is only discretionary; and if the commissioners took a bond in a sum beyond the amount of the duty, it would not vitiate the instrument; they are only bound to see that the security is sufficient.

Mr. Justice PARK.—I am of the same opinion. Although, if a Sheriff take a bond contrary to the statute 23 *Hen. 6*, and also for another consideration, the whole bond is void; yet, in *Norton v. Simmes*, a distinction was taken between a bond made void by statute and by the common law; and *Pigot's* case (a) is an authority in support of that distinction, where it was resolved, that, if some of the covenants of an indenture be against law, and some lawful, the first are void and the others stand good.

Mr. Justice GASELEE.—The declaration sets out the bond, by which it appears that the defendant, with two others, were jointly and severally bound to the plaintiffs, three of the commissioners appointed for putting in execution the several statutes for granting an aid to his Majesty for a land-tax, and also for granting the several rates and duties of assessed taxes. The plaintiffs, therefore, acted as commissioners for carrying both acts into effect.

(a) 11 Rep. 27 b.

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There is no provision in either of the statutes, that the bond shall be taken in any particular form; and the condition to pay to the commissioners does not make the whole of the bond void, particularly as there was a previous condition for the collector to pay to the receiver-general all such sums as should come to his hands upon the days and at the times appointed by the acts. In *Newman v. Newman* (a), it was held, that, in debt on a bond conditioned for the performance of several things, if one of them be void at the common law, yet the bond may be good for the others; and Lord *Ellenborough* said: "Admitting the condition of this bond to be ill as to one part of it, it seems that it may be well as to the other parts, for you may separate at the common law the bad from the good."

Mr. Justice ALDERSON concurred.

Judgment for the plaintiffs.

(a) 4 Man. & Selw. 66, S. C. 1 Stark. N. P. C. 101.

Wednesday,
 April 20th.

GODEFROY v. JAY, Gent., One &c.

In an action on the case against an attorney for negligence in suffering judgment to go by default in an action

THIS was an action on the case, brought against the defendant, an attorney of this Court, for alleged negligence, in allowing judgment to go by default in an action which the plaintiff had retained him to defend, and for not attending the execution of a writ of inquiry, the Jury found a verdict for the plaintiff:—*Held*, that it was the duty of the defendant to have pleaded the general issue, and not to have suffered judgment to go by default; and it seems that such action is maintainable without proof of special damage:—*Held* also, that the plaintiff having proved negligence in the defendant, it was incumbent on him to shew that the plaintiff had no valid defence to the action which the defendant was instructed to defend, or that the plaintiff had sustained no damage through the judgment by default.

which the plaintiff had retained him to defend. The declaration contained several special counts, the third was as follows:—

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That theretofore, to wit, on &c., at &c., the plaintiff, at the special instance and request of the defendant, retained and employed him, the defendant, as his attorney, for certain fees and rewards to be therefore paid by the plaintiff to the defendant in that behalf, to defend a certain action then depending in the Court of *King's Bench*, at the suit of one *Stephen Dubois*, against him, the plaintiff, for an alleged injury done by him, the plaintiff, to a certain son and servant of him the said *Stephen Dubois*; and the defendant then and there accepted the last-mentioned retainer, and thereupon it then and there became and was the duty of the defendant, as such attorney so retained as aforesaid, well, faithfully, diligently, and skilfully to act as the attorney of the plaintiff in and about the defending the said last-mentioned action; yet the defendant well knowing the premises, but neglecting and disregarding his duty in that behalf, and contriving and intending to injure the plaintiff, did not well, faithfully, diligently, and skilfully act as the attorney of and for the plaintiff in and about the defending of the said last-mentioned action, but, on the contrary thereof, then and there conducted himself so carelessly, negligently, and unskilfully with respect to the defence of the said last-mentioned action, and in discharge of his duty as the attorney of and for the plaintiff, that, by reason of such negligence, carelessness, and want of skill of the defendant, by and through the mere neglect and default of the defendant, afterwards, to wit, on &c., at &c., judgment by default was signed against him, the plaintiff, in the said last-mentioned action; and such further proceedings were had in the said last-mentioned action, that, afterwards, to wit, in *Easter Term*, 1826, it was considered and adjudged in and by the said Court of *King's Bench*, that *Stephen Dubois* should recover against

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the plaintiff a certain large sum of money, to wit, the sum of 30*l.* 10*s.*, and thereupon execution was, afterwards, to wit, on the 9th *May*, 1826, to wit, at &c., issued upon the said last-mentioned judgment against the plaintiff; and the plaintiff, in order to satisfy the said execution, was afterwards, to wit, on &c., at &c., forced and obliged to pay, and actually did pay to the said *Stephen Dubois*, in satisfaction of the said judgment, the money so recovered as last aforesaid, and also another large sum of money, to wit, the sum of 5*l.*, being the costs and expenses of and occasioned by the said execution, and was also forced and obliged to incur, and actually did incur, a further great expense, amounting to a further large sum of money, to wit, the sum of 50*l.*, in and about endeavouring to defend himself against the said action, and was also greatly injured in his credit and character, and put to great loss, costs, charges, trouble, and expense and inconvenience in and about, and greatly interrupted and hindered in carrying on his affairs and business, to wit, at &c.

The defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Tindal*, at *Westminster*, at the Sittings after the last *Michaelmas* Term, the evidence was as follows:—The plaintiff, being sued by one *Dubois*, for driving a gig over and injuring his child, the defendant was applied to by one *Hatton*, an agent of the plaintiff, to conduct the plaintiff's defence to such action. *Hatton* told the defendant that notice of *Dubois's* declaration had been served on the plaintiff's son instead of on the plaintiff; upon which the defendant observed, that the service was bad, and that the proceedings might be set aside at any time. *Hatton* then remarked, that the son resided in the same house with the plaintiff, and that the Christian names of both were the same; but he eventually said to the defendant: "I leave the matter in your hands;" when the defendant replied, "I will see that justice shall be done to Mr. *Godefroy*;" upon which *Hatton*

left the defendant's office. Some time after this, the defendant having suffered judgment to go by default, and the plaintiff having been served with a writ of inquiry in the action brought against him by *Dubois*, he called on the defendant, who had taken no step in the cause, when he told the plaintiff that it was of no consequence, for that as the notice of declaration had been served on his son, it was bad, and that the judgment could be set aside at any time. The defendant shortly afterwards directed his clerk to take the declaration out of the office; but, no further proceeding having been taken, the writ of inquiry was executed before the under-sheriff, and, no person attending on the part of the plaintiff, the Jury assessed the damages sustained by *Dubois* for the injury done to his child, at 31*l.* 10*s.* Judgment was afterwards entered up, and a writ of *feri facias* issued to the Sheriff, indorsed to levy that sum; under which his officer seized the plaintiff's goods, and retained them for several days, when the amount of the levy was paid by the plaintiff, together with 5*l.* for the expenses attending the execution.

The allegation of a general retainer of the defendant by the plaintiff, as set forth in the *first* and *second* counts of the declaration, not having been proved, his counsel relied on the third. His Lordship having summed up the whole of the evidence to the Jury, recommended them to find a verdict for the plaintiff for nominal damages only. They however, returned a verdict for him, damages, 45*l.* Leave was reserved to the defendant to move to reduce the verdict to one shilling, in case the Court should be of opinion that the plaintiff was not entitled to recover the full amount found by the Jury.

Mr. Serjeant *Cross*, in the last term, accordingly obtained a rule *nisi*, that the damages might be reduced pursuant to the leave given at the trial; on the grounds that the plaintiff had not shewn that he had a good defence in

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fact to the action brought against him at the suit of *Dubois*; and that this action against the defendant for negligence in the conduct of that cause, was not maintainable, unless the plaintiff could prove that he had sustained actual or special damage, as resulting immediately to him from the defendant's neglect; and that, if the plaintiff had no substantial ground of defence to *Dubois's* action, it was the most beneficial course the defendant could adopt to suffer judgment to go by default; and that as he was retained as the general agent of the plaintiff, he had a right to exercise his own discretion upon the subject, and that it was not requisite for him to attend the execution of the writ of inquiry, as it would have created an unnecessary expense to the plaintiff. At all events, the defendant is entitled to a new trial, as the damages found by the Jury were excessive, for the plaintiff did not shew that he had sustained any actual damage by the course the defendant had adopted by allowing judgment to go by default.

Mr. Serjeant *Bompas* now shewed cause.—The plaintiff proved in the first instance that he had sustained an actual damage through the negligence of the defendant as his attorney, in conducting the defence to the action brought against him by *Dubois*; and although the defendant accepted the retainer, he took no steps in the cause, but suffered judgment to go by default; in consequence of which, the plaintiff was obliged to pay the amount of the damages assessed by the Sheriff's Jury on the execution of the writ of inquiry, as well as the expenses of the levy, and those incurred in defending the action brought against him by *Dubois*. The plaintiff, therefore, having established a *prima facie* case against the defendant, it was incumbent on him to have shewn that the plaintiff had sustained no actual injury through the judgment by default, and that the defendant was warranted in suffering it, by the particular circumstances of the case. If a client

instruct his attorney to adopt a course which may prejudice his rights, he is not bound to follow it. It was not incumbent on the plaintiff to shew that he had *not* been guilty of negligence in the first instance, by running over the child, as alleged by *Dubois*;—the ground of the present action is the negligence of the defendant in the conduct of a cause with which the plaintiff had entrusted him, and retained him to defend; and when the plaintiff shewed that he had sustained an immediate damage from the act of the defendant, the latter was bound to give evidence in mitigation. It is a general and most useful rule, that the point in issue is to be proved by the party who asserts the affirmative, as in *Ross v. Hunter* (a), where, in an action for a loss occasioned by the barratry of the master of a ship, it was objected by the defendant, that the plaintiff ought to prove that the master was not also the owner or freighter, and that he did not act under the direction of the party who was, (in which case barratry could not be committed); yet, the Court held, that, if the master were owner or freighter, or acted under the direction of the owner, the *onus* of proving that fact lay on the defendant: and Mr. Justice *Buller* said—"It was not incumbent on the plaintiff to prove that the captain was not the owner, for that would be calling on him to prove a negative; and if the captain were not the owner, it is immaterial who was. Proof of that fact, which operates in discharge of the other party, lies upon him." So, here, the plaintiff was not bound to prove a negative; and, having shewn that the defendant had been guilty of negligence in the conduct of the cause he was retained to defend, it was not necessary for the plaintiff to shew that there was no ground for the judgment by default. Besides, there was no evidence that *Dubois* had a good cause of action against the plaintiff; and if the defendant had pleaded the general issue in that

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(a) 4 Term Rep. 33.

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action, the plaintiff might have shewn that he had not been guilty of the negligence imputed to him in running over the child. The proof of that fact lay on *Dubois*, the father, and the present plaintiff could not be called on to prove that he had not been guilty of negligence, or that he did not run over the child. In an action for goods sold and delivered, the defendant cannot, in the first instance, shew that they were not delivered; it is incumbent on the plaintiff to make out a *prima facie* case, and prove their delivery: and in *Lee v. Ayrton (a)*, in an action against an attorney for suffering a debtor in custody at the suit of the plaintiff to be superseded, and it was proved that the debtor was a married woman; it was held to destroy the plaintiff's right of action; and Lord *Kenyon* said—"The declaration sets out with stating, that the original defendant was indebted to the plaintiff. By the evidence it appears that this averment is not true; so that, clearly, this action cannot be maintained." In *Aitcheson v. Madock (b)*, in an action against attorneys for negligence in commencing an action against excise officers, for seizing a quantity of hair-powder belonging to the plaintiff, without giving the previous notice required by law, the plaintiff proved the seizure, and the defendants' counsel objected that it was not proved that the seizure was unlawful; to which Lord *Kenyon* answered, that he would presume the seizure unlawful, until the contrary were proved. So here, it cannot be assumed that the plaintiff had been guilty of negligence in running over *Dubois's* child, and for which the action was commenced against him: it was incumbent on the father to prove the fact in the first instance, when the plaintiff might have adduced evidence to rebut or deny it. In *Swannell v. Ellis (c)*, in an action against attorneys for negligence in conducting the

(a) *Peake's Ni. Pri. Cas.* 119,
 3rd edit. 161.

(c) 8 J. B. Moore, 340; *S. C.*
 1 Bing. 347.

(b) *Ibid.* 162, 3rd edit. 218.

plaintiff's business, they were held to be liable for not attending an arbitrator, to whom the cause was referred; and here, it was clearly the duty of the defendant to have attended the execution of the writ of inquiry, as he might have caused *Dubois's* witnesses to be cross-examined, or given evidence to shew that the plaintiff had not been guilty of the negligence imputed to him. Although, in the case of *Williams v. The East India Company* (a), in an action by the owner of a ship against the defendants, for putting on board a quantity of combustible articles, without giving due notice thereof, it was held, that it lay upon the plaintiff to prove this negative averment; yet, it was on the ground, that, where an act is required to be done by a party, the omission of which would make him guilty of a criminal neglect of duty, the law presumes the affirmative, and throws the burthen of proving the negative on the party who insists upon it; for it is one of the first principles of justice, not to presume that a person has acted illegally, till the contrary be proved: and here, the Court will not assume that the plaintiff had been guilty of negligence in running over *Dubois's* child, or that he did it intentionally; he might have shewn the reverse, if the defendant had not allowed judgment to go by default. The defendant was guilty of gross negligence in not attending the execution of the writ of inquiry. The damages found by the Jury are extremely moderate; they did not far exceed the sum actually paid by the plaintiff for the damages assessed by the Sheriff's Jury and the expenses of the execution.

Mr. Serjeant *Cross*, in support of his rule.—*First*, no action of *tort* lies for mere negligence, in the abstract, unless it be accompanied with proof of actual or special da-

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mage; and here, as the alleged *tort* rests entirely on the negligence imputed to the defendant in suffering judgment to go by default in the action brought by *Dubois* against the plaintiff, it was incumbent on him to have shewn that he had received an actual damage in consequence of that proceeding.

[Lord Chief Justice *Tindal*.—In the late case of *Marxetti v. Williams* (a), it was decided that an action on a *tort* founded on contract may be maintained without proof of special damage, and a distinction was there taken between an action which in form is founded in *tort*, but in substance is grounded on a contract:—and might not the plaintiff in this case have framed his declaration for a breach of contract by the defendant, in not having defended the action brought against the plaintiff by *Dubois*, although he had engaged to do so, and accepted a retainer for that purpose?]

In *Marxetti v. Williams*, the plaintiff's bankers refused to pay his check, although he was their customer, and had sufficient funds in their hands belonging to him, at the time the check was presented. They were, therefore, clearly wrong-doers; and, as the plaintiff was a person in trade, his credit was injured by the dishonour of the check. And the learned Judge who tried the cause (b) was of opinion that a banker, who receives a sum of money belonging to his customer, becomes his debtor the moment he receives it, and is bound to pay a check drawn by such customer, after the lapse of such a reasonable time as would afford an opportunity to the different persons in his establishment of knowing the fact of the receipt of such money; and that the refusal to pay a check under such circumstances was a breach of duty, for which an action would lie. The cause of action therefore existed and remained to the customer, un-

(a) 1 Barn. & Adolph. 415.

(b) Mr. Justice *James Parke*.

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til the amount of the check was paid; and the customer actually received a damage by the refusal to pay in the first instance. But, if a person employ an attorney to prosecute a suit, and he does not happen to be in Court at the time of the trial, and the defendant obtains a verdict, can it be suggested for a moment that the plaintiff could bring an action against the attorney for damages, or that he could be deemed liable for negligence? If a merchant direct his broker to effect an insurance on his ship, but he neglect to do so, and the ship returns safe to port, can it be said that an action would lie against the broker for negligence, when the premium of insurance would be actually saved to the party who directed the insurance to be effected? Here, the plaintiff should at least have offered some evidence to shew that he would have received an advantage if the defendant had not suffered judgment to go by default in the action brought by *Dubois*. But the allowing judgment to go by default might have been advantageous to the plaintiff, and done with a view to save costs; and he did not allege or prove any neglect of duty by the defendant in his general character of an attorney. Although it may be said that the defendant ought to have attended the execution of the writ of inquiry, yet it formed no substantial ground of complaint in the declaration, nor was any specific act of negligence or misconduct imputed to the defendant. Negligence in an attorney in the conduct of a suit cannot be presumed, but must be actually proved; and it does not follow that he is bound to plead, but he may exercise his discretion on the subject; and here it does not appear that the plaintiff furnished the defendant with any instructions for a defence upon the merits, or that he did not concur in suffering judgment to go by default. In *Johnson v. Alston* (a), it was held that an attorney, who is retained to defend an action, is not

(a) 1 Camp. 176.

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bound to follow the instructions of his client, by putting in a plea for the purpose of delay; and in *Pierce v. Blake*, Lord Chief Justice *Holt* said (a): "If an attorney puts in a false plea to delay justice, he breaks his oath, and may be fined for putting a deceit upon the Court." By the statute of *Beau-pleader* (b), "it is provided, that if any Serjeant, pleader or other, do any manner of deceit or collusion in the King's Court, or consent unto it, in deceit of the Court, or to beguile the Court, or the party, and thereof be attainted, he shall be imprisoned for a year and a day, and from thenceforth shall not be heard to plead in that Court for any man;" and Lord *Coke*, in treating of that statute, says (c), that "the words 'or other' extend to attorneys, clerks of Court, or any other." An attorney therefore is not bound to plead, or even put the general issue on the record, if his client has no real or valid defence to the action upon the merits. Besides, an attorney who is retained generally, is not an ordinary, but may be assimilated to a general agent; and here the defendant had a general authority from the plaintiff's recognised agent to act as he thought fit; and if the defendant ascertained that the plaintiff had no substantial defence to the action brought against him by *Dubois*, the plea of not guilty would have been a false plea; and it was sufficient for the defendant to exercise his judgment, whether he would put it on the record or not. In *Wolff v. Horncastle*, Mr. Justice *Buller* said (d), "It is agreed that a general agent has a right to exercise his discretion for the benefit of his principal; he must act on the spur of the occasion:" and in *Parker v. Kett*, Lord Chief Justice *Holt* said (e): "Where a deputy may be appointed, he has full power to do any act or thing which his principal might have done. That is so essen-

(a) 2 Salk. 515.

(b) 3 Edw. 1, c. 29.

(c) 2 Instit. 214.

(d) 1 Bos. & Pul. 323.

(e) 1 Salk. 95.

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tially incident to a deputy, that a man cannot be a deputy to do any single act or thing, nor can a deputy have less power than his principal." An attorney therefore must be considered as the agent or deputy of his client, and clothed with the same rights. The only distinction is, that a deputy cannot appoint a deputy, unless he has special authority so to do. Lord *Coke* says (a): "If the client would have the attorney to plead a false plea, he ought not to do it; for he may plead *quod non sum veraciter informatus, et ideo nullum responsum* &c.; and that shall be entered into the roll to save him from damages in a writ of disceit." In the late case of *Godefroy v. Dalton* (b), it was decided, that no action would lie against an attorney, unless he had been guilty of *crassa negligentia*, or a *lata culpa*, and which it was incumbent on the party complaining to prove; and here the plaintiff adduced no evidence to shew that the defendant had been guilty of negligence in suffering judgment to go by default; and as he did not plead to the action, it is not an act of negligence *per se*. The plaintiff should have gone further, and shewn that he had sustained an injury by the course that was adopted, or that he had a good defence to the action brought against him by *Dubois*. With respect to the damages, they are most unreasonable and exorbitant, for the plaintiff did not prove that he had sustained any injury, or that the same result would not have followed, if the defendant had put the plea of not guilty on the record. The Court therefore will direct the damages to be reduced, pursuant to the leave given at the trial.

Lord Chief Justice TINDAL.—I am of opinion that this verdict ought not to be disturbed. The application is, in effect, for a new trial, on the third count of the declaration, the cause of action as stated in the first and second counts having been abandoned at *Nisi Prius*. The third count

(a) 2 Instit. 215.

(b) 4 Moore & Payne, 149; S. C. 6 Bing 460.

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alleges in substance, that the plaintiff retained and employed the defendant as his attorney, to defend an action then depending at the suit of one *Dubois* against the plaintiff, and that the defendant accepted the retainer; that, thereupon, it was the duty of the defendant, as such attorney, to act diligently and skilfully in defending the action; but that he, neglecting his duty in that behalf, did not act diligently and skilfully as the attorney for the plaintiff, in defending such action; but, on the contrary, conducted himself so carelessly, negligently, and unskilfully, with respect to the defence of the action, and in discharge of his duty as such attorney, that, by reason of such negligence, carelessness, and want of skill, judgment by default was signed against the plaintiff for 31*l.* 10*s.*, and execution was afterwards issued for the amount, which the plaintiff was obliged to pay, together with 5*l.* for the costs of the execution. The question then is, whether the *gravamen*, as laid in this count, was made out by the evidence at the trial? It has been contended, in the first instance, on behalf of the defendant, that no action lies against him for mere negligence, unless the plaintiff shew a special damage accruing immediately to him in consequence of such negligence. That, however, is too broad a proposition, and is not warranted by law; for, in an action of *tort*, arising out of a breach of contract, or neglect of a duty which the law imposes, the situation of life in which the culpable party is placed must be looked at; and for a neglect or breach of a legal duty by a person in his character of an attorney, nominal damages are sufficient to entitle the party employing him to recover. This principle was established in the late case of *Marzetti v. Williams*, where the Court of *King's Bench* held that an action on a *tort*, founded on a contract, is maintainable without proof of special damage; and that, where there is a breach of an express contract, nominal damages may be recovered. It is, however, unnecessary to discuss that point in this case, because the Jury have

found damages, as referrible to the negligence of the defendant in his character of an attorney, to the amount of 45*l*. In what then did that negligence consist? The plaintiff being sued by *Dubois* for an injury done to his child, the former put the conduct of his defence into the hands of the defendant *Jay*, and upon the plaintiff's agent saying that he left the matter in the defendant's hands, he answered by saying, "I will see that justice shall be done him." The plaintiff's cause was then confided to the defendant, who afterwards suffered judgment to go by default, without even consulting his client, or taking any step to set the judgment aside. Was not that negligence? I have no hesitation in answering in the affirmative. But it has been said, that it was the duty of the defendant not to plead, or even put the general issue on the record, if there were no real defence to the action brought against the plaintiff by *Dubois*; and we have been referred to the old statute of *Beaupleader*, and other authorities, in support of that principle; but, if they are looked at, it is manifest that their sole object is to prevent a party from putting on the record pleas containing affirmative matter which is false within the knowledge of the party pleading it: it was never intended to take from the defendant any right he might have of putting the plaintiff to prove his case, whether the demand or cause of action were or were not admitted or denied. It is the province and duty of a Jury to ascertain whether the plaintiff's demand or complaint be true or false, as well as the nature and extent of its existence. It is frequently necessary to plead the general issue, in order that the amount of the damages alleged to have been sustained, may be inquired into and ascertained, and brought to the proper level. But it has been further contended, that, at all events, an attorney may use his own discretion, and suffer judgment to go by default, without incurring the expense of a plea, where his client has no substantial defence. But nothing of that sort appears to

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have passed in the mind of the present defendant; for he seems to have thought that he could set aside the judgment at any time, on account of the original defective service of the declaration on the plaintiff's son. Besides, when the plaintiff was served with a writ of inquiry, the defendant told him it was of no consequence. But the suffering judgment by default was not a prudential course to be taken by the defendant, with reference to the interests of his client: he should have appeared for him in the first instance, and pleaded according to the custom of the Court. The question then is, whether he was not guilty of a breach of duty, by which he prevented his client, the plaintiff, from defending the action brought against him, and mitigating the damages sought to be recovered by *Dubois*. If the defendant had appeared in Court for the plaintiff, he would have been entitled to cross-examine *Dubois's* witnesses, and also to reply to any observations which might be made by counsel to the Jury, of which benefit he was deprived by the defendant's suffering judgment to go by default.

With respect to the question, whether the damages were excessive, it depends entirely on the point, whether or not it was the duty of the present defendant to furnish evidence as to the original cause of action by *Dubois* against the plaintiff. He could not expect that the plaintiff would admit that *Dubois* had a good cause of action against him; and whether he had or not, might have been elicited from *Dubois's* own witnesses, or some grounds might have been shewn, from which the Jury might infer that the plaintiff had not been guilty of the negligence imputed to him. I am, therefore, of opinion that the present action was rightly conceived, and that, under all the circumstances, the damages cannot be considered as exorbitant or excessive.

Mr. Justice PARK.—I am of the same opinion. The position, that an action of *tort* is not maintainable, unless the

plaintiff shew that he has sustained special damage, is not correct in point of law; for, the Court of *King's Bench* decided expressly to the contrary in the late case of *Marzetti v. Williams*. That is not a new doctrine, for it has been frequently held, that, where the cause of action arises substantially on a contract, any breach is sufficient to entitle the plaintiff to nominal damages. In *Green v. Greenbank* (a), where the substantial ground of action was contract, it was held that the plaintiff could not, by declaring in *tort*, render a person liable who would not have been liable on his promise; and in *Marzetti v. Williams*, Mr. Justice *Patteson* said (b), "that *Green v. Greenbank* shews that the circumstance of the action being in form for a *tort* is immaterial, if the substantial ground of it be a contract. That, if the plaintiff in *Marzetti v. Williams* could have maintained *assumpsit* for the breach of contract, he might, on the same ground, maintain an action of *tort*, unless there were some distinction in this respect between an express and an implied contract. But the only distinction between the two species of contracts is, as to the mode of proof. The one is proved by the express words used by the parties, the other by circumstances shewing that the parties intended to contract. As soon as it is made out, either by direct or circumstantial evidence that there was such a contract, either of the parties may maintain an action against the other without shewing any actual damage." That appears to me to be the true principle, and decisive of the question in this case, as the defendant was not only negligent, but guilty of an omission or breach of contract, upon which an action of *assumpsit* might have been founded; and the plaintiff has not only alleged and proved that he has sustained special damage through the negligence of the defendant, but the Jury have actually assessed the damages at 45*l*. But it has been further said, that, where there is no substantial

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(a) 2 Marsh. 485.

(b) 1 Barn. & Adolph. 427.

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defence, an attorney may use his own discretion, and not plead to the action. I do not agree to that position; for, where a client requests his attorney to conduct his defence, he ought, at all events, to plead the general issue, although he might not be warranted in putting a plea on the record containing affirmative matter, or a plea on which it is difficult to take issue, and which is termed a sham plea. The plea of a judgment recovered, although false within the knowledge of the party who pleads it, is pleaded every day without objection. In criminal cases, it appears to me to be most advisable to exhort a prisoner to plead not guilty, as, on an investigation of his case, it may turn out that the offence for which he has been charged capitally may amount to a misdemeanor only. If the defendant had not suffered judgment by default in the action brought against the plaintiff by *Dubois*, the latter might not have been able to establish his case, or prove that the plaintiff had been guilty of the negligence imputed to him in running over the child. Besides, it does not appear that the defendant consulted the plaintiff, or that the latter acquiesced in letting judgment go by default; and the defendant afterwards told him that it might be set aside at any time. With respect to the damages, we are not to weigh them in nice scales; the amount was within the province of the Jury to decide; and I cannot say that the damages are excessive, or that the Jury came to a wrong conclusion.

Mr. Justice GASELEE.—The case of *Marxetti v. Williams* is not a solitary decision, for several authorities are there referred to in support of the principle, that, if there be a breach of an express or implied contract, although the declaration be framed in *tort*, the plaintiff may recover without proof of special damage. If the third count of the declaration be defective, in not having pointed out any specific act of negligence or misconduct by the defendant,

the objection is on the record, and open to the defendant on a motion in arrest of judgment. But it appears to me that such a measure would be unsuccessful, as the plaintiff has alleged that the defendant conducted himself so negligently and unskilfully in defending the action brought against the plaintiff by *Dubois*, and in discharge of his duty as the attorney for the plaintiff, that, by reason of such negligence and want of skill, judgment by default was signed against the plaintiff. That appears to me to be a sufficient allegation, and equivalent to a breach of duty, which gives the plaintiff a substantive ground of action. It is not to be presumed, that the judgment by default was suffered by the advice, or with the concurrence of the plaintiff; and although it does not clearly appear what instructions the defendant received from the plaintiff's agent, yet he said that he would see that justice should be done; and when the plaintiff applied to the defendant, after being served with a writ of inquiry, he said that it was of no consequence, as the judgment could be set aside at any time; and there is no evidence to shew that he declined to defend the action for want of sufficient instructions. It appears to me, that there is no weight in the argument that it is the duty of an attorney not to plead the general issue, if his client admits that he has no defence to the action; and the statute of *Beau-pleader* has been referred to: but, where the defendant informs his attorney that he has no valid defence, it is the constant practice to plead the general issue, in order that the damages may be ascertained by a Jury in a Court of law, instead of their being less perfectly inquired into before the Sheriff. Although an attorney may know that his client cannot obtain a verdict, as he has no defence at law, still no misconduct can be imputed to him for pleading the general issue. Besides, the defendant should at least have attended the execution of the writ of inquiry, when he might have cross-examined *Dubois's* witnesses, or attempt-

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ed to reduce his claim on the plaintiff. With respect to the damages, the amount was entirely a question for the Jury; and they do not appear to me to be extravagantly large, as the defendant did not even attend the execution of the writ of inquiry, after he had suffered judgment to go by default.

Mr. Justice ALDERSON.—This appears to me to be a very plain case. The defendant, an attorney, was retained by the plaintiff, to defend a cause for him, and the defendant accepted the retainer; and although he undertook to defend the action, yet it appears he did nothing. *Prima facie*, this is a negligence for which he is responsible to his client. If, indeed, he had any special reason for not pursuing the usual course, it was his duty to have shewn it, in answer to this action. With respect to the amount of the damages, it was not incumbent on the plaintiff to shew the circumstances under which he was sued by *Dubois*. If there were no witnesses to prove that the plaintiff drove over the child wilfully or negligently, it is not to be assumed that he did so. It might have been a mere accident, which could not have been avoided. If so, *Dubois's* cause of action against the plaintiff would have failed in effect; and even if *Dubois* had called witnesses, the plaintiff's counsel might have cross-examined them, for the purpose of ascertaining whether he had been guilty of negligence to the extent charged; if not, he would be liable to nominal damages only. On the whole, therefore, it appears to me, that the defendant has been guilty of negligence as charged in the third count of the declaration; and, consequently, that this rule must be—

Discharged.

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SHILLITO v. THEED.

Saturday,
April 23rd.

THIS was an action by the plaintiff, as indorsee, against the defendant as the acceptor of a bill of exchange. At the trial, before Lord Chief Justice *Tindal*, at *Guildhall*, at the Sittings after the last *Michaelmas* Term, it appeared that the plaintiff was a farmer and lime-burner in *Yorkshire*; that the bill was drawn on the 24th *April*, 1829, by one *Thomas M. Lee* upon the defendant, for 185*l.*, payable at seven months after date; that the bill was accepted by the defendant, and indorsed specially by *Lee* the drawer to one *Giles*, who indorsed it to *Smallpage*, a coal-merchant at *Nottingham*, who indorsed it to the plaintiff.

The acceptance and indorsements having been proved by the plaintiff, the defendant called a witness to shew that he had accepted the bill for the amount of a bet which he had lost to one *Young*, on the issue of the Great St. *Leger* stakes at *Doncaster* races in *September*, 1828, and that *Young's* name was not on the bill at the time the defendant accepted it, a blank having been left for the drawer's name; that the defendant had lost 800*l.* to *Young* on the St. *Leger*, and that the latter having lost 185*l.* to one *Mann*, *Young* proposed that he should be paid by the acceptance of the defendant for that amount, and for which the bill in question was given. It was admitted that the St. *Leger* stakes far exceeded 50*l.*, and the plaintiff proved that he gave the full consideration for the bill, which he took *bond fide* from *Smallpage*, and that he had no notice whatever of the circumstances under which the bill had been accepted, when it was given to him by *Smallpage*. For the defendant, it was objected, that, as the bill was accepted by him in payment of a bet exceeding the sum of 100*l.* on the issue of a horse race, it was

Although a wager on a horse-race, for a less sum than 10*l.*, may be legal, where the stakes exceed 50*l.*, yet a wager exceeding 10*l.* on such race, whether legal or not, is void by the statute 16 *Car.* 2, c. 7, s. 3, as the statutes 13 *Geo.* 2, c. 19, and 18 *Geo.* 2, c. 34, legalise horse-racing only, and not bets made at such races. Where, therefore, the plaintiff, as indorsee of a bill of exchange for 185*l.* sued the defendant as the acceptor, who accepted it in payment of a bet to that amount, which he lost on the St. *Leger* stakes, at *Doncaster* races:—*Held*, that the plaintiff could not recover, although he had given a valuable consideration for the bill, and had no notice of the circumstances under which it was accepted.

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void under the 2nd and 3rd sections of the statute 16 *Car.* 2, c. 7, and the 9th *Anne*, c. 14, although in the hands of a *bond fide* holder who had given a good consideration for it. His Lordship, conceiving the objection to be well founded, directed a nonsuit, reserving to the plaintiff leave to move to set it aside, and that a verdict might be entered for him for the amount of the bill, with interest, in case the Court should be of opinion that he was entitled to recover in point of law.

Mr. Serjeant *Jones*, in the last term, accordingly obtained a rule *nisi*; and, after referring to the 2nd and 3rd sections of the statute 16 *Car.* 2, c. 7 (a), the 1st and 5th

(a) The 2nd section enacts, "That, if any person or persons of any degree or quality whatsoever, at any time or times after the 29th day of *September*, 1664, do or shall, by any fraud, shift, cosenage, circumvention, deceit, or unlawful device, or ill practice whatsoever, in playing at or with cards, dice, tables, tennis, bowls, skittles, shovel-board; or in any cock-fightings, *horse-races*, dog-matches, foot-races, or other pastimes, game or games whatsoever, at, in, or by bearing a share or part in the stakes, wagers, or adventures, or in or by betting on the sides or hands of such as do or shall play, act, ride, or run as aforesaid, win, obtain, or acquire to him or themselves, or to any other or others, any sum or sums of money, or other valuable thing or things whatsoever; that, then, every person and persons so offending as aforesaid, shall, *ipso facto*, forfeit and lose treble the sum or value of

money, or other thing or things so won, gained, obtained, or acquired."

By the 3rd section, for the better avoiding and preventing of all excessive and immoderate playing and gaming for the time to come, it is enacted, "That, if any person or persons shall, at any time or times after the 29th *September* aforesaid, play at any of the said games, or any other pastime, game, or games whatsoever (other than with and for ready money), or shall bet on the sides or hands of such as do or shall play thereat, and shall lose any sum or sums of money, or other thing or things so played for, exceeding the sum of 100*l.*, at any one time or meeting, upon ticket or credit, or otherwise, and shall not pay down the same at the time when he or they shall so lose the same; the party and parties who loseth or shall lose the said monies, or other thing or things so played or to be played for, above

sections of the statute 9 *Anac*, c. 14(a), the 5th section

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the said sum of 100*l.*, shall not, in that case, be bound or compelled or compellable to pay or make good the same; but the contract and contracts for the same, and for every part thereof, and all and singular judgments, statutes, and bonds, *bills*, specialties, promises, covenants, agreements, and other acts, deeds, and securities whatsoever, which shall be obtained, made, given, acknowledged, or entered into for security or satisfaction of or for the same or any part thereof, shall be utterly void and of none effect: and that the said person or persons so winning the said monies, or other things, shall forfeit and lose treble the value of all such sum and sums of money, or other thing or things, which he shall so win, gain, obtain, or acquire, above the said sum of 100*l.*"

(a) The 1st section, after reciting 'That the laws now in force for preventing the mischiefs which may happen by gaming have not been found sufficient for that purpose, therefore, for the further preventing of all excessive and deceitful gaming,' it is enacted, "That, from and after the 1st day of *May*, 1711, all notes, *bills*, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, drawn, or entered into, or executed by any person or persons whatsoever, where the whole or any part of the consideration of such conveyances or securities shall be for any

money, or other valuable thing whatsoever, won by gaming or playing at cards, dice, tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the re-imbursing or repaying any money knowingly lent or advanced for such gaming or betting, as aforesaid, or lent and advanced at the time and place of such play, to any person or persons so gaming or betting as aforesaid, or that shall, during such play, so play or bet, shall be utterly void, frustrate, and of none effect, to all intents and purposes whatsoever; any statute, law, or usage to the contrary thereof, in anywise notwithstanding," &c. &c.

The 5th section enacts, "That, if any person or persons whatsoever, at any time or times after the said first of *May*, 1711, do or shall, by any fraud or shift, cosenage, circumvention, deceit, or unlawful device, or ill practice whatsoever, in playing at or with cards, dice, or any the games aforesaid, or in or by bearing a share or part in the stakes, wagers, or adventures, or in or by betting on the sides or hands of such as do or shall play as aforesaid, win, obtain, or acquire to him or themselves, or to any other or others, any sum or sums of money, or other valuable thing or things whatsoever, or shall, at any one time or sitting, win of any one or more persons whatsoever, above

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of the statute 13 *Geo. 2*, c. 19 (a), and the 11th section of the statute 18 *Geo. 2*, c. 34 (b), by which the 3rd section of the statute 13 *Geo. 2*, c. 19, as far as regards race-horses carrying weights, was repealed—submitted, that, although the bill in question might have been void under the statutes 16 *Car. 2*, and 9 *Anne*, yet that the statute 13 *Geo. 2*, c. 19, followed by the statute 18 *Geo. 2*, c. 34, having legalized horse-racing for a stake of 50*l.* and upwards, the plaintiff was entitled to recover, he being the *bond fide* holder of the bill for a valuable consideration, and the *St. Ledger* stakes being a legal race and exceeding 50*l.* A wager is the subject of an action at law, unless it be opposed to

the sum or value of 10*l.*, that then every person or persons so winning by such ill practice as aforesaid, or winning at any one time or sitting above the said sum or value of 10*l.*, and being convicted of any of the said offences, upon an indictment or information to be exhibited against him or them for that purpose, shall forfeit five times the value of the sum or sums of money, or other thing, so won as aforesaid; and, in case of such ill practice as aforesaid, shall be deemed infamous, and suffer such corporal punishment as in cases of wilful perjury, &c. &c.”

(a) By which it is enacted, “That, from and after the 24th *June*, 1740, no person or persons whatsoever shall start or run any match with or between any horse, mare, or gelding, for any sum of money, plate, prize, or other thing whatsoever, unless such match shall be started or run at *Newmarket Heath*, in the counties of *Cambridge* and *Suffolk*, or *Black Hambleton*, in the county of *York*, or

the said sum of money, plate, prize, or other thing, be of the real and intrinsic value of 50*l.* or upwards: and in case any person or persons shall start or run any such match at any other place than *Newmarket Heath*, or *Black Hambleton* aforesaid, or for any plate, prize, sum of money, or other thing, of less value than 50*l.*, every such person or persons shall forfeit and lose the sum of 200*l.*”

(b) By which it was enacted, “That it shall and may be lawful for any person or persons, from and after the 24th of *June*, 1745, to run any match, or to start and run for any plate, prize, sum of money, or other thing, of the real and intrinsic value of 50*l.* or upwards, at any weights whatsoever, and at any place or places whatsoever, without incurring or being liable to the penalty or penalties in 13 *Geo. 2*, c. 19, s. 3, relating to weights therein mentioned, as might have been done if that act had never been made.”

the direct enactments of an act of Parliament, or to public policy; and it has been decided that a party may recover for a bet, where the matter in dispute is not of an immoral tendency, or the wager is not of a trifling or frivolous nature. In *Good v. Elliott* (a), it was held that an action might be maintained upon a wager, that one person had purchased a wagon of another. A wager, therefore, *simpliciter* as a wager, is neither illegal nor void; and the statute 16 Car. 2, c. 7, was passed to prevent deceitful, disorderly, and excessive gaming; and although it embraces horse-races, it cannot apply to a race which is now sanctioned by the Legislature, and legalized by the statutes 13 Geo. 2, and 18 Geo. 2, and which in effect repeal the previous acts of *Charles* the Second and *Anne*; and although in *Goodburn v. Marley* (b), it was held that horse-races were within the words and operation of those statutes, yet their effect is taken away, *quoad* horse-races, where the stakes are to the amount of 50*l.* and upwards, within the statutes of *George* the Second. Although, in *Clayton v. Jennings* (c), it was decided that betting at a horse-race above the sum of 10*l.* was within the statute of *Anne*, yet it was there urged in argument, and not objected to by the Court, that the statute 18 Geo. 2, made horse-racing lawful if it were for 50*l.*; and that, if the game be lawful, betting at it is also lawful. In *Blaxton v. Pye* (d), it was held, that a horse-race was within the statute of *Anne*, which act the Court said they ought to extend, to prevent excessive betting upon all sports as well as games. But here, the *St. Leger* stakes were within the rules prescribed by the later statutes, and expressly protected by the 5th section of the 13 Geo. 2, c. 19. And in *M'Allester v. Haden* (e), which was an action upon a wager of four guineas to six on a horse-race for one hundred guineas,

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(a) 3 Term Rep. 693.

(d) 2 Wils. 309.

(b) 2 Str. 1159.

(e) 2 Camp. 438.

(c) 2 Sir Win. Bl. 706.

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Mr. Justice *Lawrence* was of opinion that the bet, being under 10*l.*, was not contrary to the statute 9 *Anne*, c. 14, and that the race, being for upwards of 50*l.*, was not contrary to the statute 13 *Geo.* 2, c. 19, and that the action well lay. In *Johnson v. Bann* (a), it was held, that an action to recover a wager on a horse-race for a smaller sum than 50*l.*, could not be supported, as such race was prohibited by the 13 *Geo.* 2, c. 19; and that, as the race, which was the subject of the wager, was illegal, so also was the wager; yet that case cannot apply, as here the race was legal; and it follows that a bet upon such a race is legal also. In *Lynall v. Longbotham* (b), and *Brown v. Berkley* (c), it was decided that a foot-race is a game within the statute 9 *Anne*, c. 14; but those cases are beside the present question, which must be decided on the construction of the statutes 13 *Geo.* 2, and 18 *Geo.* 2; and although the objection might be available against the original parties to the bet, yet it would be most mischievous to the circulation of bills of exchange and instruments of a like nature, if they should be deemed void in the hands of a *bond fide* holder, who had no notice of the circumstances under which such instruments had been concocted, and who takes them for a valuable consideration.

Mr. Serjeant *Bompas* now shewed cause.—It is quite clear that horse-racing is gaming within the statutes 16 *Car.* 2, c. 7, and 9 *Anne*, c. 14. In the second section of the former statute, horse-races are expressly named, and the first section of the statute 9 *Anne*, c. 14, enacts, that all notes, bills, or other securities given for money won by gaming, or by betting on the sides of such as do game, shall be utterly void to all intents and purposes whatsoever, and the case of *Clayton v. Jennings* is an express authority

(a) 4 Term Rep. 1.

(b) 2 Wils. 36.

(c) Cowp. 281.

to shew, that betting on a horse-race to an amount above 10*l.* is within that statute: and it is immaterial whether the race be lawful or not; for, on its being insisted by counsel, that, if a man loses 10*l.* by playing or betting at a game, it was within the statute, the Court were of that opinion; and Mr. Justice *Aston* mentioned the case of *Connor v. Quick*, where the Court took a distinction between running a horse for 50*l.*, which was lawful, and betting on the side of the horse, which was not so. In *Bacon's Abridgment* (a) it is laid down, "that a horse-race is a game within the statute of *Anne*, and that it is immaterial to consider whether the game itself be lawful or not; for if a man loses 10*l.* by playing or betting at it, it is within the statute." Although the statute 13 *Geo. 2*, c. 19, has legalized horse-racing to a given extent and subject to certain regulations, yet betting, under that statute, is illegal, as the Legislature did not mean to repeal the statutes of *Charles 2*, and *Anne*, as far as they related to betting; and the 1st section of the statute 13 *Geo. 2*, after reciting, that the great number of horse-races for small plates, prizes, or sums of money, had contributed very much to the encouragement of idleness, and the breed of strong and useful horses had been much prejudiced thereby, enacts, "that no person shall enter, start, or run any horse for any plate, prize, sum of money, or other thing, unless such horse shall be truly and *bonâ fide* the property of and belonging to such person so entering, starting, or running the same; nor shall any one person enter and start more than one horse for one and the same plate, prize, or sum;" and the 2nd section enacts, "that no plate or prize shall be run for, unless it shall be of the full and intrinsic value of 50*l.* or upwards." The main objects of this statute were to improve the breed of horses, and prevent excessive gaming, by betting, or otherwise. So, the 8th section of the statute 18 *Geo. 2*, c. 34, enacts,

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(a) Tit. "Gaming," Vol. 3, p. 343.

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“that, if any person shall win or lose at play, or by betting, at any one time, the sum or value of 10*l.*, such person shall be liable to be indicted for such offence, and, being thereof legally convicted, shall be fined five times the value of the sum so won or lost.” Betting, therefore, on any subject, to the amount of more than 10*l.*, is unlawful, although the subject-matter of the bet may be in itself legal, or sanctioned by statute. In *M'Alleston v. Haden*, the bet was under 10*l.*, and the learned reporter there states in a note (a), that, if the sum betted on a horse-race by either of the parties be *above* 10*l.*, an action will not lie on the wager; and he refers to several authorities in support of that position. In *Whaley v. Pajot*, Lord Chief Justice Eldon said (b)—“There seems to be much ground for arguing, from the nature of the 16 *Car. 2.*, and 9 *Anne*, that these acts ought to be construed strictly, in order to enforce the principle on which they are founded, namely, to prohibit all horse-racing; and that the 13 *Geo. 2.*, and 18 *Geo. 2.* are, from their nature, to be so construed, as to encourage the breed of horses, and to permit that species of horse-racing only, called racing on the turf.” That is the true distinction; and, although horse-racing may be lawful under certain restrictions and regulations, yet a bet upon it is illegal; and in *Bowyer v. Bampton* (c), it was expressly decided, with reference to the statute 9 *Anne*, c. 14, that the innocent indorsee of a promissory note given for a gaming transaction, cannot maintain an action against the maker.

Mr. Serjeant *Jones*, in support of his rule.—It must be considered, that the question in this case does not arise between the original parties to the bet, to which the plaintiff was a perfect stranger, he being a remote indorsee of the bill, for which he gave full value; besides which, he had no notice that it had been concocted illegally, or that it had been

(a) 2 Camp. 439.

(b) 2 Bos. & Pul. 54.

(c) 2 Str. 1155.

accepted by the defendant in payment of a bet won on the *St. Leger* stakes. The statute 16 *Car. 2*, c. 7, s. 2, applies only to sums won or obtained by fraudulent or deceitful play; and although horse-racing has been held to be a game within the statute 9 *Anne*, c. 14, yet the statutes 13 *Geo. 2*, c. 19, and 18 *Geo. 2*, c. 34, legalize horse-races which were before prohibited, subject, however, to certain rules and provisions; and the *St. Leger* stakes being for a sum exceeding 50*l.*, the race was within the latter acts, and a wager upon it may be recovered in an action at law. The question, then, is, whether a bet exceeding 10*l.* on a legal race is in itself illegal and void. In *Johnson v. Bann*, the race, being for a smaller sum than 50*l.*, was expressly prohibited by the statute 13 *Geo. 2*; and it therefore follows, that, as the subject of the wager was illegal, so also was the wager. But, as wagers in general are not illegal, unless they are contrary to public policy, decency, or positive statutory enactment; and an event which is not ascertained, but which is about to occur, may be made the subject of a lawful wager; and as horse-racing is now allowed and sanctioned by the Legislature, a bet upon a race where the stakes are more than 50*l.* is a lawful bet, although it was formerly illegal under the statutes of *Charles* the Second and 9 *Anne*, c. 14.

Lord Chief Justice TINDAL.—This is an action on a bill of exchange for 185*l.*, drawn by one *Lee* upon the defendant, who accepted it for the payment of a bet or wager lost by him to the amount of the bill, on the *St. Leger* stakes at *Doncaster*, which, it is admitted, was a legal horse-race, such stakes being above the value of 50*l.* The question, then, is, whether, on the construction of the several acts of Parliament to which we have been referred, the plaintiff, as indorsee of the bill in question, is entitled to recover against the defendant, as the acceptor. It is unnecessary, in the first instance, to go further than the provi-

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sions of the statute 16 *Car. 2*, c. 7, the 2nd section of which declares horse-racing to be an illegal game; and the 3rd section enacts, "that, if any person or persons shall play at any of the *said games*, (other than with and for ready money), or shall bet on the sides or hands of such as do, or shall play thereat, and shall lose any sum or sums of money, or other thing or things so played for, *exceeding the sum of 100*l.** at any one time or meeting, upon ticket or credit, or otherwise, and shall not pay down the same at the time, the party who loseth, or shall lose, the said monies or other thing or things so played or to be played for, *above the said sum of 100*l.**, shall not be bound or compelled to pay or make good the same, but the contract for the same, and for every part thereof, and all and singular judgments, statutes, bonds, *bills*, specialties, promises, agreements, deeds, and securities whatsoever, which shall be obtained, made, given, acknowledged, or entered into, for security or satisfaction of or for the same, or any part thereof, shall be utterly void and of none effect." Now, the bill in question appears to me to fall within this section, as it exceeds 100*l.*, it being accepted by the defendant for 185*l.*—the amount of a sum lost by him by betting at a horse-race. If there were no other legislative provision, there can be no doubt but that the bill would be void, although in the hands of an innocent indorsee. But it has been said that subsequent statutes legalize horse-races, subject, however, to certain restrictions and regulations, and that they also incidentally legalize bets made upon such races. That, however, does not appear to me to follow as a necessary inference; on the contrary, it would be at variance with the intention of the Legislature, as expressed in the statutes of *George the Second*. The 13 *Geo. 2*, c. 19, is intituled "An act to restrain and prevent the excessive increase of horse-races, and for amending an act made in the last session of Parliament, intituled 'An act for the more effectual preventing of excessive and deceitful gam-

ing.” The first section of the statute then enacts, that “no person shall enter, start, or run any horse, for any plate or prize, unless such horse shall be *bond fide* his property; and that no one person shall enter and start more than one horse for one and the same plate or prize;” and the second section enacts, that “no plate, prize, or sum shall be run for by any horse, unless such plate, prize, or sum shall be of the full and intrinsic value of 50*l.* or upwards.” The clear object of the Legislature, therefore, was, to encourage and promote improvement in the breed of horses, by affording an adequate object of competition to the breeders, and giving them something worth contending for, in races which their horses might be entered to start for. But that can have nothing to do with the practice of betting at a horse-race, which may be carried on by idle spectators and bystanders, who have no interest whatever in the horses which are running, or are about to run. The 1st section, which requires that the horses entered to be run shall be the property of the owners, shews that the real and *bond fide* owners only were to have an interest in the race. That clause has never been repealed, nor has any subsequent statute legalized bets made on a horse-race, although the stakes exceed 50*l.*; and the fair and obvious construction to be put on the statute 13 *Geo. 2* is, that it does not legalize bets made on a horse-race, but the running of the horses only. Then came the statute 18 *Geo. 2*, c. 34, which is intituled “An act to explain, amend, and make more effectual the laws in being, to prevent excessive and deceitful gaming, and to restrain and prevent the excessive increase of horse-races.” That statute has, in effect, the same tendency as the previous act of the 13 *Geo. 2*; and by the 10th section it is provided and declared, that “nothing in that act contained shall extend, or be construed to extend, to repeal or invalidate an act made in the ninth year of the reign of her late Majesty Queen *Anne*, intituled ‘An act for the better preventing excessive and deceitful gaming.’ All the clauses in the statute of *Anne*, there-

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fore, still remain in full force; and that act incorporates several of the provisions of the statute 16 *Car. 2*, which have not been altered or repealed. The case of *Goodburn v. Marley* was decided in *Michaelmas Term*, 15 *Geo. 2*, two years after the statute 13 *Geo. 2* was passed; and yet it was not surmised that a wager exceeding 10*l.* on a horse-race was legal, although the race itself might have been so. It therefore appears to me, from the general construction to be put on all the statutes, that, although a wager for a less sum than 10*l.* might be legal on a lawful horse-race, where the stakes exceed 50*l.*, yet, that a wager exceeding 10*l.* on a horse-race, whether legal or illegal, is void, and, consequently, that the nonsuit was right; and there is no legal ground to set it aside, or to enter a verdict for the plaintiff for the amount of the bill.

Mr. Justice PARK.—My Lord Chief Justice has gone so fully into the construction that he thinks ought to be put on the provisions of the different statutes referrible to this question, that I need only say that I perfectly concur with him, and think that he has come to a right conclusion. Although it has been said, that, if we decide against the plaintiff's right to recover on the bill, we shall defeat the object of the statutes 13 *Geo. 2*, and 18 *Geo. 2*, which have made horse-races legal, yet they only permit them to be encouraged *sub modo*; and betting at such races cannot tend to the improvement in the breed of horses, which it was the main object of the Legislature to promote. It is quite clear that horse-racing was meant to be prohibited by the statute of 16 *Car. 2*, as it is expressly mentioned and designated as a game in the 2nd section of that act, and the third section enacts, that, if any person shall play at any of the *said* games (that is, the games enumerated in the 2nd section), or bet on the sides of such as shall play thereat, and lose any sum exceeding 100*l.*, and shall not pay down the same at the time of the loss, the party losing

shall not be bound or compelled to make good the same; and here the bill of exchange upon which the plaintiff sues, was accepted by the defendant for the sum of 185*l*. It has also been expressly decided, that horse-racing is a game within the terms and meaning of the statute of *Anne*, which has not been repealed by the statutes of *George* the Second; and notes, bills, bonds, and other securities of a like nature, given by any person, where the whole or any part of the consideration of such securities, shall be for any money won by any game whatsoever, or by betting on the sides of such as do game, shall be utterly void. I am, therefore, of opinion, that the nonsuit was proper, and that there is no ground for setting it aside.

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Mr. Justice GASELEE.—I am also of the same opinion. The titles of and penalties imposed by the statutes 13 *Geo.* 2, and 18 *Geo.* 2, expressly shew that those acts were intended to legalize horse-racing, by imposing certain restrictions upon such races, and to check and prevent their increase.

Mr. Justice ALDERSON.—It is not necessary for us to determine whether a bet or wager under 10*l*. on a legal horse-race, would be illegal or not; for it is sufficient to say, that, as the bill in question was given for an amount exceeding 100*l*., for a bet lost at a horse-race, it is illegal, and falls expressly within the provisions of the statute 16 *Car.* 2, c. 7, s. 3. This rule therefore must be—

Discharged (*a*).

(*a*) But see *Edwards v. Dick*, 4 Barn. & Ald. 212, where, in an action against the drawer of a bill of exchange for 240*l*., it was held to be no defence, that the bill was accepted for a gaming debt, it having

been indorsed over by the drawer to the plaintiff for a valuable consideration, who sued in his character of indorsee. But see *Henderson v. Benson*, 8 Price, 281.

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WRIGHT and Another v. WRIGHT.

A will, by which the testator devised his real estates, was written and signed by himself previously to its being signed by any witness. He afterwards requested a female to sign her name in his presence, which she did, and he informed her that it was his will. Some time afterwards, when she was not present, the testator requested two other witnesses to sign their names, in his presence, which they did, but the testator did not inform them that it was his will, nor did any of the witnesses see the testator's signature at the time of their attesting the will. Immediately above the names of the witnesses there were these words in the handwriting of the testator: "signed, sealed, published, and declared by T. W., (the testator), as his will, in the presence of us, who, at his request, and in his presence,

and in the presence of each other, have hereunto subscribed our names as witnesses hereto:—
Held to be a sufficient attestation of the will.

IN this case, his Honour, the Vice Chancellor, had directed a feigned issue to try the question, whether or not, one *Thomas Wright*, deceased, did, by a certain paper writing, purporting to be his last will and testament, devise his freehold estates? The plaintiffs were legatees under the will, and the defendant was the testator's heir-at-law. The cause came on for trial, before Mr. Justice *Littledale*, at *Norwich*, at the last Summer Assizes for the county of *Norfolk*, when the Jury found a special verdict. The paper writing purporting to be the will of *Thomas Wright*, deceased, was set out *in totidem verbis* at the commencement of the special verdict, and the Jury found, that the whole of the instrument, with the exception of the signatures of two of the witnesses, and the mark of the third, was in the testator's own handwriting. They also found that the said paper writing (excepting the words '*Elizabeth Flaxman*' ✕, 'her mark', the two former of which words were written on one side of that witness's mark ✕, and the two latter on the other,) was wholly written by the testator; and that his signature, opposite the seal, was made before the said paper writing was signed by the witnesses *Judith Evetts*, *Henry Walker*, and *Elizabeth Flaxman*, or either of them; that, about six years before his death, the testator requested the said *Judith Evetts* to sign her name to the said paper writing in his presence, which she accordingly did; and that, at the time of her so signing the same, he informed her that the said paper writing was his will; that, after she had so signed, but at another time, and when she was not present, the

testator requested the said *Henry Walker* to sign his name, and the said *Elizabeth Flaxman* to make her mark, which they accordingly did, in the testator's presence, and in the presence of each other; and that, after the said *Elizabeth Flaxman* had so made her mark, the testator wrote against such mark the words "*Elizabeth Flaxman*," "her mark," in manner aforesaid; that the last two witnesses were not at any time informed that the said paper writing was the testator's will, nor did any of the witnesses, at the time of attesting the said paper writing, see the testator's signature opposite the seal thereof. The Jury further found, that, at the time of his writing and signing the said paper writing, and at the times of the several attestations thereto, the testator was of sound and disposing mind.

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On reference to the paper writing, as set out in the special verdict, it appeared, that, immediately above the names of the witnesses, were written these words by the testator: "Signed, sealed, published, and declared by the said testator *Thomas Wright*, as and for his last will and testament, in the presence of us, who, at his request, and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses hereto."

The case was now called on for argument, when—

Mr. Serjeant *Taddy*, for the plaintiffs, as legatees, and in support of the will, was stopped by the Court, who called on—

Mr. Serjeant *Storks* to distinguish this case from that of *The Trustees of The British Museum v. White (a)*, where a testator wrote and signed his will, by which he devised his real estates. He afterwards requested two persons to sign their names to it, which they did in his presence, but they did not see the signature of the testa-

(a) 3 Moore & Payne, 689; S. C. 6 Bing. 310.

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tor, nor did he ever inform them of the nature of the instrument they had signed. Some time afterwards, the testator requested a third person to sign his name, which he did in the presence of the testator, who told him that the paper in question was his will. Immediately above the names of the witnesses, there was written by the devisor, "in the presence of us, as witnesses thereto;" and it was held, that this was a sufficient attestation and subscription of the will by the three witnesses, within the statute of frauds.

The learned Serjeant submitted, that, in that case, it appeared, that, immediately above the names of the witnesses, there was written in the hand of the testator, "in the presence of us, as witnesses *thereto*," which were unequivocal; whilst here, the words were "in the presence of us, who, at the testator's request, and in his presence, and in the presence of each other, have *hereunto* subscribed our names as witnesses *hereto*," which might admit of some degree of doubt; and the Jury found that neither of the witnesses saw the testator's signature at the time they attested the will.

But the Court observed, that, as the Jury had found that the whole of the will was in the testator's own handwriting, with the exception of the signatures of two of the witnesses, and the mark of the third, and that the testator had written the words "signed, sealed, published, and declared by the said testator *Thomas Wright*, as and for his last will and testament," immediately above, and which formed part of the sentence concluding with the words "in the presence of us, who at his request, and in his presence, and in the presence of each other, have *hereunto* subscribed our names as witnesses *hereto*;" it was a stronger case than that of *White v. The Trustees of the British Museum*; and that, if the defendant felt himself dissatisfied with the decision in that case, to which the Court meant to adhere, he might, if he thought fit, ap-

peal to a higher tribunal, as the question was open to him on the record.

Judgment for the plaintiffs (a).

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v.
WRIGHT.

(a) When this issue came on for trial, before Mr. Justice *Little-ale*, the Vice Chancellor had ordered, that one of the legatees was to be at liberty to attend the trial of such issue; the learned Judge held, that the counsel for

such legatee had no right to address the Jury, or to call witnesses; but that he might cross-examine the witnesses called by the plaintiffs and defendant, and suggest points of law. See 4 Car. & Payne, Ni. Pri. Cas. 389.

POPKINS, Gent., One &c. v. AMORY.

Saturday,
April 30th.

A RULE was obtained by Mr. Serjeant *Spankie*, on a former day in this Term, calling on the plaintiff to shew cause why the writ of attachment of privilege which he had sued out against the defendant, should not be set aside, and why the bail-bond, which the defendant had given on his arrest under the said writ, should not be delivered up to be cancelled; on the ground that there were not fifteen days between the *teste* and the return of the writ.

On a motion to set aside a writ of attachment of privilege, on the ground that there were not fifteen days between the *teste* and return, the Court permitted the plaintiff to amend without costs; and where a party moves to set aside proceedings for a mere irregularity in process, which is amendable as of course, he is not entitled to costs.

Mr. Serjeant *Andrews* now shewed cause.—In *Davis v. Owen* (a), where there were not fifteen days between the *teste* and return of a *capias*, the Court allowed it to be amended; and in *Tidd's Practice* (b), it is said, “that, as the writ of *capias quare clausum fregit* is founded on a supposed original, there should regularly be fifteen days between the *teste* and return: that, if there were not so many, the Court would formerly have set aside the proceedings

(a) 1 Bos. & Pul. 342.

(b) 9th edit. Vol. 1, p. 153.

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for irregularity, with costs; but afterwards, they permitted this defect to be amended: and now, the amendment being a matter of course, it seems the Court will not set aside the process for irregularity on this ground;" and the cases of *Carty v. Ashley* (a), *Bouchier v. Wittle* (b), and *Davis v. Owen*, are referred to. And in *Walker v. Hawkey* (c), where a writ of *capias ad respondendum* was made returnable on a day certain, instead of a general return day, the Court permitted it to be amended, even after a rule *nisi* had been obtained to quash the writ for irregularity.

Mr. Serjeant *Spankie*, in support of his rule.—In the cases referred to, the amendments were allowed in serviceable process; whilst here, the defendant was arrested on an irregular writ, sued out by an attorney of the Court; and an attachment of privilege is in the nature of an original writ.

But the Court permitted the plaintiff to amend the writ without payment of costs, and intimated, that, in future, whenever process is amendable as of course, for a mere irregularity, the party applying to set it aside should not be entitled to costs.

Rule to set aside the writ and cancel the bail-bond—

Discharged.

To amend the writ—

Absolute, without costs (d).

(a) 3 Wils. 454; S.C. 2 Sir W. Bl. 918.

(b) 1 H. Bl. 291.

(c) 5 Taunt. 853; S.C. 1 Marsh. 399.

(d) In *Carty v. Ashley*, Mr. Justice Gould said, (3 Wils. 454), "Although this Court cannot

amend an original writ, because it issues out of the Court of Chancery, yet this Court can amend all *mesme* process, and also an attachment of privilege which is in the nature of an original." See, also, *Adams v. Luck*, 6 B. Moore, 113.

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HUTHWAITE v. HOOD.

*Saturday,
April 30th.*

MR. Serjeant *Jones* moved for leave to enter up judgment on an old warrant of attorney, on an affidavit of the agent of the plaintiff, who deposed, that the defendant, being justly indebted to the plaintiff in the sum of 85*l.* 1*l.* 4*d.* on a promissory note made by the defendant, he executed a warrant of attorney on the 23rd *January*, 1830, to secure the said sum; and that default had been made in payment by the defendant; that the above sum still remained due and unpaid to the plaintiff, and that he saw the defendant execute the warrant of attorney. The learned Serjeant submitted, that, as this affidavit would be sufficient to hold the defendant to bail, it was at all events framed with sufficient precision to entitle the plaintiff to enter up his judgment on the warrant of attorney.

The Court allowed judgment to be entered up on an old warrant of attorney, upon an affidavit by the plaintiff's agent, that he saw the defendant execute the warrant of attorney, which was given to secure a sum of money due to the plaintiff, which remained due and unpaid.

The Court being of that opinion—

Rule absolute.

THWAITES v. SAINSBURY.

*Monday,
May 2nd.*

THIS was an action of *assumpsit* for goods sold and delivered. The defendant pleaded the general issue.

At the trial, before Mr. Justice *Gaselee*, at *Westminster*, at the sittings after the last term, it appeared, that, in 1828, the plaintiff, an upholsterer, had supplied the defendant with cabinet and other furniture, to the amount of 397*l.*; that the defendant gave the

In *assumpsit* for goods sold, and a plea of the general issue, the only question was, whether the plaintiff had agreed to take certain bills of exchange in payment of his demand, and to exonerate the defendant from

all responsibility on account of such bills; and the Jury found a verdict for the plaintiff. On a motion for a new trial, on the ground that the verdict was against evidence, the Court imposed on the defendant the terms of confining the inquiry on the second trial to that single point, and to pay the amount of the verdict into Court, together with the costs of the first trial.

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plaintiff, in part payment, a bill of exchange, dated on the 18th *June*, 1827, for 300*l.*, payable at thirty-three months after date, drawn by Sir *Gerard Noel* upon, and accepted by, *Leigh Hunt*.—The plaintiff having proved the sale and delivery of the goods, the defendant called a witness, who stated, that the plaintiff, in *October*, 1828, gave up the 300*l.* bill to the defendant, and took three other bills of 100*l.* each in lieu thereof, accepted by *Leigh Hunt* and one *Clarke*, in full payment for his the plaintiff's demand on the defendant; that the plaintiff took these bills on his own risk, and agreed to exonerate the defendant from all responsibility respecting them, in case they were not paid by the acceptors, or other parties to them. The bills, on becoming due, were all dishonoured, and turned out to be of no value whatever. The Jury found a verdict for the plaintiff for 300*l.*, being the amount of the bills.

Mr. Serjeant *Spankie*, on a former day in this term, obtained a rule *nisi*, that this verdict might be set aside, and a new trial had, on the ground that the verdict was against evidence, as the only question was, whether the plaintiff had agreed to take the three substituted bills at his own risk, and in payment for the goods; and, as the defendant's witness proved that fact, the verdict could not be supported.

Mr. Serjeant *Jones* now shewed cause.—It is quite clear that the plaintiff delivered the goods to the defendant, and that he has not been paid for them; and whether the plaintiff agreed to take the substituted bills on his own risk, and to exonerate the defendant from all responsibility respecting them, was purely a question for the Jury: and the learned Judge who tried the cause has not expressed himself to be dissatisfied with the verdict. The witness who was called for the defendant, was not entitled to much credit; and it is highly improbable to suppose

that the plaintiff agreed to take the substituted bills absolutely, and on his own risk; it must therefore be assumed that the Jury did not attach much weight to his testimony: and as the bills turned out to be mere waste paper, they cannot be considered as payment, or a discharge of the plaintiff's original demand, unless he expressly agreed to take all responsibility upon himself, and to accept them as payment, at all events. There can be no doubt but that justice has been done by the verdict for the plaintiff; and the Court will not assume that he engaged to exonerate the defendant from all liability on the three substituted bills, or that he should not resort to his original demand, in case they should be dishonoured when due.

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Mr. Serjeant *Spankie* and Mr. Serjeant *Adams*, in support of the rule, submitted, that, as the plaintiff gave up the first bill for 300*l.*, and requested that three others might be given in lieu thereof, he was estopped by his own act from resorting to his original demand; neither could he be entitled to recover the amount of the substituted bills from the defendant, as he had expressly agreed to exonerate him from all responsibility respecting them.

But the Court observed, that, as the main if not the only question raised at the trial was, whether the plaintiff had agreed to take the three substituted bills for better or worse, and to discharge the defendant from all responsibility in case the bills should not be paid when due, the defendant ought to be limited to the proof of that single point; for, if the ground of defence had been pleaded, he would, on a second trial, be necessarily confined to the proof of the issue on the record at the first trial. They, therefore, imposed on the defendant the terms of paying the costs of the first trial, bringing into Court the amount of the verdict found for the plaintiff, and limiting the inquiry on the second trial to the single point,

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whether the plaintiff had agreed to take the three substituted bills at his own risk, and at all events, and to discharge the defendant from all liability respecting them.

On these terms being acceded to on the part of the defendant, the rule for a new trial was accordingly made

Absolute.

Monday,
May 2nd.

The plaintiff having been nonsuited, and costs taxed for the defendant, the Court refused to allow the plaintiff to set them off against costs to be taxed for him in an action of ejectment, in which he had obtained a verdict, but which the defendant had obtained a rule *nisi* to set aside, and enter a nonsuit.

MASTERMAN and Others v. MALIN.

THE plaintiffs, in this cause, having been nonsuited, and costs taxed for the defendant—

Mr. Serjeant *Andrews*, on a former day, *viz.* on the 25th April, obtained a rule *nisi* that the plaintiffs might be at liberty to set off such costs, against costs to be taxed for the plaintiffs in an action of ejectment, in which the lessors of the plaintiff had obtained a verdict, *viz.* in the cause of *Doe d. Masterman and Others v. Malin*, but which was now under the consideration of this Court, as the defendant, on a former day in this term, had obtained a rule *nisi* for entering a nonsuit, on the ground, that the lessors of the plaintiff had not shewn a sufficient title to the premises sought to be recovered, and that the defendant was in the adverse possession at the time their title accrued.

Mr. Serjeant *Bompas* afterwards shewed cause, and submitted, that, as the costs had been taxed for the defendant on the judgment of nonsuit, and it was quite uncertain whether the verdict found for the lessors of the plaintiff in the action of ejectment could be sustained, the Court would not allow the costs of the nonsuit to be set off against those in the ejectment; particularly, as judgment had not been signed in that action; and it is not sworn that the defendant

is insolvent; nor has any special reason been assigned for the application, which is contrary to practice and authority.

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Mr. Serjeant *Andrews*, in support of his rule, observed, that the application was made to the equitable discretion of the Court.

Lord Chief Justice TINDAL.—We ought not to deprive the defendant of his right to the judgment of nonsuit, and the costs which have been taxed upon it. The application by the plaintiffs to set off the costs to be taxed for them in the action of ejectment, appears to me to be made *quia timent* they may not be able to support the verdict, the Court having granted a rule to set it aside and enter a nonsuit. Besides, this application cannot be warranted on principle, and no authority or precedent has been referred to in its support.

Per Curiam.

Rule discharged, with costs.

SAME v. SAME.

MR. Serjeant *Andrews* afterwards obtained a rule *nisi*, that the defendant might be restrained from suing out execution for the costs of the nonsuit, until the Court should have come to a decision on the rule for setting aside the verdict and entering a nonsuit in the cause of *Doe d. Masterman v. Malin*.

Where the costs of a nonsuit had been taxed for the defendant, and levied, the Court discharged a rule for restraining the execution, with costs, although the plaintiff had obtained a verdict against the defendant in a cross action, which he had obtained a rule *nisi* to set aside.

Mr. Serjeant *Bompas* now shewed cause, and submitted, that, as the Court had decided that the costs of the action of ejectment could not be set off against the costs of the

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nonsuit, which were not only due and existing, but actually taxed, there was no ground for this application, which was in effect the same as the former.

The Court said, that, as they had been furnished with the learned Judge's (a) report in the case of *Doe d. Masterman v. Malin*, they were now ready to proceed upon the motion to enter a nonsuit; and that a short suspension of the defendant's right to the costs taxed for him did not appear to fall within the reason of the decision on the former rule; and they appeared inclined to make this rule absolute for staying the execution, when—

Mr. Serjeant *Bompas* produced an affidavit, which stated, that, after the costs of the nonsuit were taxed, the plaintiffs' attorney said, that he would give a check for the amount; that he had not done so; and that, in consequence, the defendant's attorney had sued out a *ca. sa.* under which the costs had been actually levied, and the Sheriff had received his fees for making the levy. The defendant's attorney also swore that he was authorized by the defendant to sue out execution, and that he was prompted to do so, as the plaintiffs' attorney had violated his engagement to pay the costs after taxation.

Upon which the Court ordered the rule to be—

Discharged, with costs.

(a) Mr. Baron Bayley.

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BARDWELL and Others v. LYDALL.

Tuesday,
May 3rd.

THIS was an action of *assumpsit* on a guarantie contained in a letter written and signed by the defendant, and addressed to the plaintiffs. The letter was as follows:—

“*London, March 19, 1828.*

“Gentlemen—In consideration of your giving credit in the way of your trade to *Lionel Mayhew*, I guaranty to you the payment of any debt which he may contract with you from time to time, as a running balance of account, to any amount not exceeding 400*l.*”

At the trial, before Lord Chief Justice *Tindal*, at *Guildhall*, at the Sittings after the last *Michaelmas* Term, it appeared that the plaintiffs, who are silk mercers and warehousemen in *Cheapside*, had, on the faith of the above guarantie, supplied *Mayhew*, a linen-draper at *Hackney*, with goods to the amount of 825*l.* 4*s.* 4*d.*; and that he, being embarrassed and insolvent, assigned all his stock in trade and effects to trustees, to be divided rateably among his creditors, in satisfaction of their debts. That the plaintiffs claimed a debt of 625*l.* as a balance due to them against *Mayhew's* estate, and received from the trustees, in common with the rest of the creditors, a dividend of 8*s.* 9*d.* in the pound, on their whole demand. That the dividend amounted to 273*l.* 8*s.* 9*d.*, leaving 351*l.* 11*s.* 3*d.* due from *Mayhew* to the plaintiffs, for the recovery of which sum the present action was brought, it being the difference between the dividend and the whole debt due from *Mayhew* to the plaintiffs.

The defendant gave the plaintiffs the following guarantie, contained in a letter—“In consideration of your giving credit in the way of your trade to *L. M.*, I guaranty to you the payment of any debt which he may contract with you from time to time, as a running balance of account, to any amount not exceeding 400*l.*” The plaintiffs, on the faith of this guarantie, supplied *L. M.* with goods to the amount of 800*l.*; and he afterwards, being in insolvent circumstances, assigned all his effects to trustees for the benefit of his creditors. The plaintiffs claimed a debt of 625*l.*, as the balance due to them against *L. M.'s* estate, and received a dividend of 8*s.* 9*d.* in the pound on the whole debt. In an action by the plaintiffs

against the defendant on his guarantie:—*Held*, that they were not entitled to deduct the whole sum received, as a dividend from the gross amount of the debt, and to hold the defendant liable on his guarantie for the residue of the demand up to the extent of the guarantie; but that the dividend received was to be applied rateably to the whole debt, as well the part covered by the guarantie as that which was not; and therefore, that a rateable deduction was to be made for the sum covered by the guarantie.

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For the defendant it was contended, that the plaintiffs had no right to deduct the whole sum of 273*l.* 8*s.* 9*d.*, which they had received as a dividend, from the gross amount of their debt, and to hold the defendant liable, on his guarantie, for the residue of the demand up to the extent of the guarantie, but that the dividend received by the plaintiffs ought to be applied rateably to the whole debt, as well the part covered by the guarantie, as that which was left uncovered; and therefore, that a rateable deduction ought to be made for the sum covered by the guarantie. The defendant paid 112*l.* 13*s.* 3*d.* into Court, and the Jury found a verdict for the plaintiffs, damages 238*l.* 18*s.*, making, with the 112*l.* 13*s.* 3*d.* paid into Court, 351*l.* 11*s.* 3*d.*, the full amount of the debt remaining due from *Mayhew* to the plaintiffs. Leave, however, was reserved to the defendant to move to reduce the damages, in case the Court should be of opinion that the rateable deduction ought to be made according to the principle contended for at the trial.

Mr. Serjeant *Russell*, in the last term, accordingly obtained a rule *nisi* to reduce the verdict from 238*l.* 18*s.* to 112*l.* 6*s.* 9*d.*; which sum, added to the 112*l.* 13*s.* 3*d.* paid into Court, and 175*l.*, being the dividend upon 400*l.*, at 8*s.* 9*d.* in the pound, would make up the 400*l.* for which the defendant was liable on his guarantie. If the defendant had paid the plaintiffs 400*l.*, to which extent he was liable; he might have come in as a creditor of *Mayhew*, and received a dividend from his estate, by which his liability would be reduced by the amount of the dividend he might be entitled to receive; and when, in the case of bankruptcy or insolvency, a surety has paid the debt for which he is liable, or part of it in discharge of the whole, he may prove the sum he has thus paid as a debt upon the estate, if the original creditor have not already proved; and if he has proved, then, the surety must stand in the place of the creditor, as to dividends and all other rights

to which the creditor was entitled; and in *Paley v. Field* (a), where a surety in a bond, conditioned for payments generally, paid the penalty after the bankruptcy of his principal, it was held that he was entitled to a proportion of the dividends received by the obligee of the bond from the estate of the bankrupt principal, although such obligee was a creditor to a much larger amount than the sum secured by the bond; and the Master of the Rolls considered that the dividend was received on each portion of the debt, and that, as to the portion covered by the guarantie, the creditor was a trustee for the surety.

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Mr. Serjeant *Taddy*, on a former day in this term, shewed cause.—The plaintiffs are entitled to deduct the whole sum received as a dividend from the gross amount of the debt due to them from *Mayhew*, and to sue the defendant on his guarantie for the residue of their demand, to the full extent of his guarantie; or, in other terms, they may treat the sum received on the dividend as a payment in gross of part of the debt, and therefore have a right to deduct it, and claim the remainder from the defendant, under his guarantie. The plaintiffs therefore are entitled to retain their verdict for the amount of the deficiency upon the whole of the debt due to them from *Mayhew*, such deficiency being less than 400*l.*; and they are not limited to the deficiency upon 400*l.* of the debt, after receiving the dividend on that sum. The express object of the guarantie was to secure to the plaintiffs twenty shillings in the pound; and, in consideration of their giving credit to *Mayhew*, the defendant guaranteed to them the payment of any debt which *Mayhew* might contract with the plaintiffs, from time to time, as a running balance of account, to any amount not exceeding 400*l.*; and it appears that, after the receipt of the dividend, 351*l.* 11*s* 3*d.* remained due to the plaintiffs from *Mayhew*, on the ba-

(a) 12 Ves. 435.

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lance of the accounts between them. Their original claim against his estate was a debt of 625*l.*, upon which they received a dividend amounting to 273*l.* 8*s.* 9*d.*; and if *Mayhew* had not assigned his effects to trustees, but had himself paid the amount of the dividend previously to his becoming insolvent, there can be no doubt but that the defendant would have been liable to pay the plaintiffs the sum of 351*l.* 11*s.* 3*d.*, as the balance due to them from *Mayhew*; and it is immaterial, as far as regards this question, whether *Mayhew's* estate remained in his own hands or was assigned to his trustees, or whether the plaintiffs received part payment from him or them; and it was impossible for the plaintiffs to know what balance might be due to them from *Mayhew*, until the amount of the dividend had been ascertained and paid. Although a Court of equity will, in some cases, interfere, and afford a remedy to a surety or party giving a guarantie, and, with respect to the amount of the debt to be proved, or the proportion of the dividends to be received by the surety, a rule was laid down by Lord *Loughborough*, in the case of *Ex parte Turner (a)*, that the amount should be such a proportion of the whole money paid by the surety, as should not prejudice the rights of the creditor whose debt was secured, but leave him in the same situation as if the debt secured to him had been expunged; yet a surety, being equally liable with the bankrupt or insolvent himself, ought to derive no advantage from the principal creditor's proving the debt against the latter, without first making up to him the loss which he would otherwise sustain by having made that proof, without which the surety could have had no dividend at all. Although, in *Ex parte Rushforth*, Lord *Eldon* said (*b*), "it is now the settled law, that a surety in a bond may compel the principal creditor to go in and prove the bond under the commission, and, if the surety pays the whole, the cre-

(a) 3 Ves. 243.

(b) 10 Ves. 414.

ditor will be a trustee of the dividends for him;" yet, here the defendant had not paid the whole, nor had the plaintiffs received the full amount of their debt from *Mayhew's* estate. In *Paley v. Field*, the defendants had two demands on separate commissions, the one as creditors upon a bond, the other on bills of exchange, and the dividend was held to belong to the plaintiff, because *he had paid* the defendants as obligors of the bond *the full amount* to which he was liable; for it was expressly stipulated and declared, that the plaintiff should not be liable to pay, by virtue of the condition of the bond, any larger sum than 1500*l.*, which sum he paid with interest; and the Master of the Rolls said (a)—"I am not able to discover any substantial distinction between this case and *Ex parte Rushforth*. Indeed, this is the stronger and the clearer of the two; as this instrument marks more distinctly, that the sum, for which the surety was to be answerable, was, as against him, to be considered as the whole amount of the creditor's demand: I hardly know how the parties could have more clearly provided, not merely that the plaintiff should not be called upon to answer for more than 1500*l.*, but that, with regard to him, the creditor should be considered as limited to that sum." Here, however, the plaintiffs might have trusted *Mayhew* to any extent, and the defendant undertook to be liable for 400*l.*, whatever the balance of the account might be against him. At all events, the doctrine of Courts of equity cannot apply to this case, as the plaintiffs have made their claim in a Court of law; and the deduction now sought to be made from the verdict which the Jury have found for them cannot be supported on any legal ground, nor is it warranted by authority or principle.

Mr. Serjeant *Russell*, in support of his rule.—If the plaintiffs had received a dividend of nineteen shillings in the

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(a) 12 Ves. 443.

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pound from *Mayhew's* estate, the defendant would only be liable to make up the deficiency; for a dividend is a payment of so much of each separate pound of the creditor's debt. It is not necessary for the Court to resort to an equitable consideration of this point, as the question depends entirely on the construction of the guarantie, by which the defendant was only to be liable to the amount of 400*l.* of *Mayhew's* entire debt; and as the plaintiffs received a dividend of 8*s.* 9*d.* in the pound, they can only recover from the defendant the sum of 11*s.* 3*d.* remaining due on each pound to the extent of 400*l.* If the plaintiffs supplied *Mayhew* with goods beyond the value of 400*l.*, they did so at their own risk; and if they had called on the defendant to pay according to the terms of the guarantie, and he had paid them 400*l.*, he would clearly have been entitled to come in as a creditor under *Mayhew's* estate, and claim the dividend of 8*s.* 9*d.* in the pound; and, as the plaintiffs have received that dividend, it must be taken to refer to each particular pound. And the principle established in the case of *Paley v. Field* is expressly applicable to the present; and the defendant is consequently entitled to the deduction he now claims.

Cur. adv. vult.

Lord Chief Justice TINDAL, now delivered the judgment of the Court as follows:—

This was an action upon a guarantie, contained in a letter addressed by the defendant to the plaintiffs, in these terms:—"In consideration of your giving credit in the way of your trade to *Lionel Mayhew*, I guaranty to you the payment of any debt which he may contract with you from time to time, as a running balance of account, to any amount not exceeding 400*l.*"

It appeared at the trial, that the plaintiffs, on the faith of this guarantie, had furnished *Mayhew* with goods to an amount far exceeding the 400*l.*; and that *Mayhew*, be-

coming embarrassed, assigned his effects to trustees for the payment of his creditors, *pro rata*; when the plaintiffs claimed a debt of 625*l.* against his estate, and received from the trustees, in common with the rest of the creditors, a dividend of 8*s.* 9*d.* in the pound on the whole debt. .

The present action was brought to recover the difference between the dividend and the whole debt, being a sum less than the 400*l.* secured by the guarantie.

On the part of the defendant, it was contended, that the plaintiffs had no right to deduct the *whole* sum received as a dividend from the gross amount of the debt, and to hold the defendant liable on the guarantie for the residue of the demand, up to the extent of the guarantie; but that the dividend received by the plaintiffs was to be applied rateably to the whole debt, as well the part covered by the guarantie, as the part which was left uncovered; and, consequently, a rateable deduction was to be made for the sum covered by the guarantie. The defendant had paid into Court the sum of 112*l.* 13*s.* 3*d.* And the Jury found a verdict for the plaintiffs, with 238*l.* 18*s.* damages, being the full amount of the debt remaining due to them; leave being reserved to the defendant to move to reduce the damages, if the Court should be of opinion that the rateable deduction was to be made, on the principle contended for by him.

And, upon consideration, we are of opinion that such deduction ought to be made. If the whole amount of the debt from *Mayhew* had not exceeded the 400*l.*, it is clear that the defendant would have received the full benefit of the dividend of 8*s.* 9*d.* in the pound, as he could not have been answerable under the guarantie for more than the remainder, after the deduction of such dividend: and although the amount of the debt does in this case exceed the 400*l.*, and thereby the position of the creditor is so far altered, that one part of his debt, *viz.* to the extent of

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400*l.*, is guaranteed, and the remainder not, still there seems no reason why the application of a payment of so much in the pound upon the whole debt, should in any way be affected by the collateral circumstance of the guarantie; or why such payment should not be applicable as well to the 400*l.* guaranteed, as to the part uncovered by the guarantie: for, suppose the sum which exceeds the 400*l.* had been covered by the guarantie of another person, could it be contended that the plaintiffs might have applied the whole of the dividend to either part of the demand at their own election, and thus have varied, at their own pleasure, the extent of the responsibility of the two sureties? In the case supposed, we think each of the sureties might have claimed a rateable deduction out of each pound of the amount of debt to which their respective guaranties extended. And if so, the same result appears to us to follow, whether the excess beyond the 400*l.* is covered by the guarantie of a stranger, or the creditor is contented to become his own surety for the residue, and to look for payment of it to the principal debtor alone.

Again, suppose, in the principal case, the defendant *had paid* the 400*l.* to the plaintiffs, *before* the plaintiffs had made their claim against *Mayhew's* estate. There could be no doubt, in that case, that if they proved the whole demand, they would have been trustees for the defendant for the dividend on the 400*l.*; or, if they had declined to prove, that the defendant might have received the dividend on that sum, if the trust deed admitted of such an arrangement. And what difference can it make in the equitable rights of the defendant, whether such payment is made before, or is sought to be enforced against him after, the payment *pro rata* out of the estate of the principal?

Indeed, the case seems to be decided as to the right of the surety to claim the benefit of the deduction now contend-

ed for in a Court of equity, by the case of *Paley v. Field*(a), which is in substance and effect the same as the present. The Court there held, that the dividend was received on each portion of the debt, and that, as to the portion of the debt covered by the guarantie, the creditor was a trustee for the surety. The Master of the Rolls there observing(a), “That, unless this were so, it would follow that the guarantie would operate to compel the surety to contribute, in effect, to indemnify *Field* (the defendant) against a loss, against which it was expressly provided that he should not be indemnified, *viz.* a loss occasioned by his advancing more than the sum of 1500*l.*”—the extent of the guarantie limited by the bond.

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The argument on the part of the plaintiffs proceeds on the ground, that they may treat the payment as a payment in gross of part of the debt; and, consequently, have the right to deduct it, and to claim the remainder under the guarantie. And further, it is urged, that, whatever may be the decision or doctrine of a *Court of equity*, this is a question in a *Court of law*, and the deduction cannot be supported upon any legal ground.

It appears to us, however, that both these objections are answered by adverting to the evidence given in the cause. The payment was not a payment in gross, but a payment specifically made by the trustees, and specifically received by the plaintiffs, as so much in each and every pound of the whole amount of the debt; so that there is a specific appropriation of payment to each and every part of the demand, which appears to us, in law, to operate as a payment of the 400*l.*, as well as a part payment of the residue.

Upon this short ground, we think, in the present case, the same deduction may be made in law, to which the defendants appear entitled in reason and good sense, with-

(a) 12 Ves. 435.

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out compelling him to have recourse to a Court of equity; and, accordingly, we think the present rule should be made—

Absolute.

Tuesday,
 May 3rd.

The putative father of a bastard child voluntarily entered into a bond, conditioned to pay the plaintiffs, parish officers, and their successors, 2s. 6d. per week, for all costs and charges concerning the child, so long as it should live, and be provided for at the expense of the parish. To an action on the bond, to recover divers weekly payments, the defendant pleaded that he was able and willing to provide for the child without the assistance of the parish, and that he had requested the plaintiffs to deliver it over to his care; but that the child had been provided for at the expense of the parish, by the plaintiffs, of their own wrong, and that, if they were damnified, they were damnified of their own wrong:—*Held, first*, that the bond was a valid security, and an indemnity to the parish to a certain extent; and *secondly*, that the plea disclosed no matter of legal defence to the action, as the only plea in discharge of the bond would be performance, as the child had been provided for at the expense of the parish.

POPE and four Others v. SALE.

THIS was an action of debt on a bastardy bond. The plaintiffs, *James Pope* and *John Sutthery*, as churchwardens, *Deborah Stratton*, *John Flaxman*, and *John Puddephatt*, as overseers of the poor of the parish of *Chesham*, declared, that the defendant, by his certain writing obligatory, dated on the 8th *July*, 1830, and sealed with his seal, acknowledged himself to be held and firmly bound to *James Pope* and *John Sutthery*, churchwardens, *William Gomm*, *James Clare*, *Benjamin Batchelor*, and *John Allnutt*, overseers of the poor of the parish of *Chesham* aforesaid, in the sum of 100*l.* of lawful money of *Great Britain*, to be paid to the said *James Pope*, *John Sutthery*, *William Gomm*, *James Clare*, *Benjamin Batchelor*, and *John Allnutt*, or their certain attorney, executors, administrators, or assigns;—which said writing obligatory was and is subject to a certain condition thereunder written, whereby—after reciting, that *Hannah Atkins*, of the parish of *Chesham*, in the county of *Bucks*, single woman, did, in and by her voluntary examination in writing, taken on oath before *William Lowndes*, Esq., one of his Majesty's Justices of the Peace for the said county, declare herself to be with child, and that the said child was likely to be born a bastard, and to be chargeable to the said parish of *Chesham*, and that the defendant was the father of the said child:—and also reciting, that the defend-

ant, in order to indemnify the said parish of *Chesham* from the maintenance of the said child, as much as in him lay, had applied to the said churchwardens and overseers, to take his security for the maintenance of the said child, which they had consented to do, as in the condition was thereafter mentioned; and that, therefore, the defendant had entered into that, his bond, as security for the payment of the sum of forty shillings, for the month's lying-in of the said *Hannah Atkins*, and the payment of the weekly sum of two shillings and sixpence, from the expiration of the said month, for the support of the said bastard child, so long as he or she should continue to be provided for at the expense of the said parish of *Chesham*:—the condition of the said writing obligatory was declared to be such, that, if the defendant, his heirs, executors, or administrators, did and should well and truly pay or cause to be paid unto the said *James Pope, John Sutthery, William Gomm, James Clare, Benjamin Batchelor, and John Allutt*, or either of them, and their successors, churchwardens and overseers of the poor of the parish of *Chesham* for the time being, the sum of forty shillings for the month's lying-in of the said *Hannah Atkins*, and also the weekly sum of two shillings and six-pence, for and on account of all manner of rates, costs, charges, and expenses, which should or might in any manner arise, happen, come, grow, or be imposed upon the said churchwardens and overseers of the poor of the parish of *Chesham* for the time being, touching or concerning the said bastard child begotten on the body of the said *Hannah Atkins* as aforesaid, the sum of two shillings and sixpence to be paid weekly in each and every week, for and during so long time as the said bastard child should continue to live and be provided for at the expense of the said parish of *Chesham*, and to begin immediately from and after the expiration of the month's lying-in of the said *Hannah Atkins*; then the said writing obligatory was to be void and of none effect;—otherwise, to

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remain in full force, power, and virtue. The plaintiffs then averred, that, after the making of the said writing obligatory, to wit, on &c., the child with which the said *Hannah Atkins* was so pregnant, and whereof the defendant was such reputed father as aforesaid, was born, and is still living, to wit, at the parish of *Chesham* aforesaid; yet, that the defendant (although often requested so to do) did not, nor would, from and after the expiration of the month's lying-in of the said *Hannah Atkins*, well and truly pay, or cause to be paid, unto the said churchwardens and overseers of the poor of the parish of *Chesham*, and their successors for the time being, the said weekly sum of two shillings and sixpence, for and on account of all manner of rates, costs, charges, and expenses, which did arise, happen, come, or were imposed upon the said churchwardens and overseers for the time being, touching or concerning the said bastard child begotten on the body of the said *Hannah Atkins* as aforesaid, for and during so long time as the said bastard child did continue to live and be provided for at the expense of the said parish of *Chesham*, but wholly refused and neglected so to do; and, on the contrary thereof, after the making of the said writing obligatory, and after the expiration of the month's lying-in of the said *Hannah Atkins*, and whilst certain successors of the said churchwardens and overseers in the said writing obligatory mentioned, to wit, the said *James Pope* and *John Sutthery* were churchwardens, and *Wm. Weedon*, *Wm. Puddephatt*, *John Howard*, and *Samuel Puddephatt*, were overseers of the poor of the said parish of *Chesham*, and during the time the said bastard child did continue to live and be provided for at the expense of the said parish, to wit, on &c., at *Chesham* aforesaid, a large sum of money, to wit, the sum of 4*l.* 10*s.*, for and on account of thirty-six of the said weekly payments in the said condition mentioned, became and was due and owing from the defendant, and still is in arrear and unpaid, contrary

to the form and effect of the said writing obligatory, and of the said condition thereof, to wit, at *Chesham* aforesaid. And the plaintiffs, as churchwardens and overseers of the poor of *Chesham* as aforesaid, assigned as a further breach of the said condition of the said writing obligatory, that, afterwards, and whilst the plaintiffs *James Pope* and *John Sutherly* were churchwardens, and the plaintiffs *Deborah Stratton*, *John Flaxman*, and *John Puddephatt*, were overseers of the poor of the said parish, the plaintiffs being successors of the said churchwardens and overseers in the said writing obligatory and condition mentioned as aforesaid, and during the time the said bastard child did continue to live and be provided for at the expense of the said parish of *Chesham*, to wit, on &c., a certain other sum of money, to wit, the sum of 12s. 6d., for and on account of five other of the said weekly payments in the said condition mentioned, became and was due and owing from the defendant, and still is in arrear and unpaid, contrary to the form and effect of the said writing obligatory, and of the said condition thereof, to wit, at *Chesham* aforesaid; by reason of which said several breaches, the said writing obligatory became and was forfeited, and thereby, and by force of the statute in such case made and provided, an action had accrued to the plaintiffs, as such churchwardens and overseers as aforesaid, &c. &c.

The defendant pleaded—*First, non est factum*; *Secondly*, that, before and at the said several times the said several payments claimed by the plaintiffs, as churchwardens and overseers as aforesaid, became due and payable, the child was nine years old, and able to earn wages, and support and maintain itself by employment, and that the defendant was ready and willing to employ it, and pay reasonable wages for such employ, of which the plaintiffs, as churchwardens and overseers as aforesaid, had notice; but that they voluntarily, and of their own wrong, maintained and made provision for the child—*Thirdly*, that, before and at the said several

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times when the said supposed weekly payments, in the said supposed breaches of the condition of the said writing obligatory in the said declaration mentioned, were supposed to have become due and owing from the defendant, to wit, on &c., at *Chesham* aforesaid, the said bastard child had attained a certain age, to wit, the age of nine years, and was then past the age of nurture; and that the said bastard child, at the time of making the request by the defendant thereinafter mentioned, was, and from thence hitherto had been, under the power and control of the said churchwardens and overseers of the poor of the said parish of *Chesham* for the time being:—and the defendant further said, that he, the defendant, was then and there, and thence hitherto had been, and still was, able and ready and willing wholly and completely to keep, maintain, and provide for the said bastard child, without the aid or assistance of the said parish; and then and there, theretofore, and before any of the said times last above mentioned, to wit, on &c., at *Chesham* aforesaid, requested and desired the then churchwardens and overseers of the said parish, and often afterwards requested and desired the plaintiffs, since they became churchwardens and overseers, to deliver over the said bastard child to his, the defendant's, care and management, whereby the said bastard child might have been provided for, without being chargeable to the said parish; but that the said bastard child had, during all the respective times in the said respective supposed breaches above mentioned, been provided for at the expense of the said parish of *Chesham* by the plaintiffs, and the respective churchwardens and overseers of the said parish for the time being, voluntarily, and of their wrong; and that, if the plaintiffs, or the said parish, were or had been damnified, they had been and were damnified of their own wrong, &c. &c.

The plaintiffs joined issue upon the first plea, and replied to the second, that the child was not able to earn wages and support itself by employment, upon which issue

was also joined; and to the third plea, the plaintiffs replied, that the said bastard child was not under the power and control of the said churchwardens and overseers of the said parish of *Chesham* for the time being, in manner and form as the defendant had in that plea above alleged;—upon which issue was also joined.

At the trial, before Lord Chief Justice *Tindal*, at *Guildhall*, at the Sittings after the last *Michaelmas* Term, the Jury found a verdict for the plaintiffs on the first and second issues, and for the defendant on the third; leave being reserved to the plaintiffs to move the Court to enter up a verdict for them for *5l. 2s. 6d.*, the amount of the damages assessed by the Jury to be due from the defendant upon the bond, if the Court should be of opinion that the third plea could not be supported, or was not an answer to the action.

Mr. Serjeant *Wilde*, in the last term, accordingly obtained a rule nisi that judgment might be entered for the plaintiffs for *5l. 2s. 6d.*, notwithstanding the verdict found for the defendant on the third plea, on the ground that such plea was no bar to the plaintiffs' right of action. The child was not taken or maintained by the defendant from the time of its birth; and it having been once chargeable to the parish, the putative father cannot, at his own option, take it out of the custody or control of the overseers to relieve himself from his indemnity, which was procured from him by compulsion, as he was called upon to give the bond on the oath of the mother of the child, who swore that the defendant was its father. A putative father has, by law, no right to the custody of a bastard child, and public policy requires that he should not have such a right. Although, in *Burwell's* case (*a*), the Court said, that the father of a bastard child might take it away from the parish when he pleased; and, in *Sherman's* case, Mr.

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Justice *Twisden* said (a), that Justices of the Peace could not order a weekly sum to be paid, until a bastard child should be able to get its living, for perhaps the father would take it away and maintain it himself, which he might do if he pleased; and, in *Newland v. Osomond* (b), Lord Chief Justice *Lee*, Mr. Justice *Wright*, and Mr. Justice *Denison* were of opinion that the putative father of a bastard child has a right to maintain it himself; yet Mr. Justice *Foster* doubted, and said, "that, in his opinion, there would be danger of bastard children dying for want of care, or of their being murdered, if all the putative fathers of such children could take them from the officers of the parishes wherein they are born, and carry them where they please." In the case of *The Queen v. Smith* (c), where, on an order to pay one shilling a-week till the child was eight years old, it was insisted that the father might take him, yet the Court said "that he ought to have done it at first, and, by suffering the order to be made, it should be deemed a refusal in law; besides, he should not then be suffered: he might sell him or make away with him, as too often happens." In *Hulland v. Malken* (d), although the Court observed—"We need not, in this case, say whether the father or the mother hath a right to have the child, while under seven years of age;" yet the reporter states that Lord Chief Justice *Wilmot* said, "that he would give no opinion whether the father has any power over the child, who is *nullius filius*. *Grotius* says, truly, "the mother is the only certain parent; and an order of Justices to remove the mother always removes the child." Although, in the case of *The King v. The Inhabitants of Hodnett* (e), it was insisted by counsel, that a father has a right to take his illegitimate child out of the parish; yet, the decision of the Court was confined to the single point, that bastards are

(a) 1 Vent. 210.

(c) 1 Bott, 497.

(b) Sayer, 94; S. C. 1 Bott, by Const, 466.

(d) 2 Wils. 126.

(e) 1 Term Rep. 96.

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within the meaning of the marriage act, 26 Geo. 2, c. 33, which requires the consent of the father, guardian, or mother, to the marriage of persons under age, who are not married by banns. In *The King v. Soper*, Lord Kenyon said (a), that the putative father had no right to the custody of the child, which was accordingly restored to the mother; and in *The King v. Moseley* (b), where the putative father of a bastard obtained possession of it by force or fraud, the Court ordered it to be restored to the mother, on an application by her for that purpose. In *Strangeways v. Robinson* (c), although the Court gave no opinion upon the point, whether, after a bastard has passed the age of nurture, the putative father can claim the custody of the child, yet Sir James Mansfield said—"Considering who the persons are who are likely to be fathers of children of this description, it is a very strong proposition to lay down, that any father, no matter who—any ragged vagabond whatever—although much less competent to educate the child than those who before had the custody, shall have a right to call for the custody of the child, the moment it attains the age of seven years." There, a plea was held bad, as the defendant did not aver that the child was within the power and custody of the overseers; and although the present defendant has alleged that fact in the third plea, yet, it is not sufficient to relieve him from his bond of indemnity to the parish, as he only avers that he offered to provide for the child after it had passed the age of nurture; previously to which, it had been maintained by the parish; and the plaintiffs, as churchwardens and overseers, are entitled to sue the defendant on his bond.

Mr. Serjeant *E. Lawes*, on a former day in this term, shewed cause.—Although a distinction may be taken where a bastard child has been in the custody of the putative fa-

(a) 5 Term Rep. 278.

(c) 4 Taunt. 498.

(b) 5 East, 224, n.

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ther, and maintained by him from its birth, and where it has been under the control of the parish officers until it has passed the age of nurture, yet public policy and natural feeling are in favour of the father's claim; and here the defendant has averred in his plea, that the child was nine years old, and that he was able and willing to maintain and provide for it, without the assistance of the parish; and it is infinitely more for the benefit and interest of the child to be under the care and protection of a father who is able and willing to maintain it, than to remain in the custody, or to be under the control of parish officers, who may treat it with harshness or indifference. There is no decision adverse to the claim of the putative father to his child; for, in *Burwell's* case (a), the Court resolved that he might take it from the parish when he pleased. The same doctrine was laid down by Mr. Justice *Twisden*, in *Sherman's* case; and the authority of these cases has never been disputed. In *Richards v. Hodges* (b), where, to an action on a bond to indemnify the parish from the costs of maintaining a bastard child, the defendant pleaded *non damnificatus* generally; and the plaintiffs, in their replication, shewed how they were damnified; and the defendant rejoined, that they were damnified of their own wrong; it was held that the rejoinder was bad, because it was a departure from the plea, in which the defendant alleged that the parishioners were not damnified. The case of *Newland v. Osmond* is precisely in point, where the Court held, that the putative father might take his bastard child from the parish, and maintain it himself; and said, that this has always been given as a reason why orders for the maintenance of such children must not be limited to any certain time. If the putative father, on being taken before a magistrate, says that he is willing and able to provide for the child, and that he will maintain it at his own expense, the magistrate would not make an order for its maintenance and support. Lord

(a) 1 Vent. 48.

(b) 2 Wms. Saund. 83.

Ellenborough frequently reprobated the conduct of magistrates who interfered, and made orders for the relief of bastard children, where the putative fathers were in opulent circumstances, and willing to maintain them themselves. In *Strangeways v. Robinson*, the defendant's plea was held to be bad, as it did not allege that the child was in the possession of the parish officers; whilst here, the defendant has averred, that, at the time he requested the overseers to deliver over the child to him, it was under their power and control. The case of *The King v. Hodnett* does not apply to the question before the Court, as it merely decided that bastards are within the meaning of the marriage act; but Mr. Justice *Buller* said (a)—“The rule that a bastard is *nullius filius* applies only to the case of inheritances; it was so considered by Lord *Coke*.” In the cases of *The King v. Soper*, and *The King v. Moseley*, the putative father had obtained possession of the child from its mother by fraud, and the Court ordered it to be restored to her; but that is altogether different from a claim made by the father on the parish officers, who is not only desirous to have the child, but states that he is able and ready to support it.

But, independently of the question as to the defendant's right to claim and support the child, the bond in question is not an indemnity bond upon which the plaintiffs are entitled to sue as successors to the obligees, as no right of action passes to them as such; and, as the bond was neither an indemnity bond, nor a bond given by virtue of the adjudication of a magistrate, it is void at law, and no action can be maintained upon it. It is quite clear that it is not an indemnity bond, but a mere voluntary bond to pay *2s. 6d. per week* during the time the child should continue to live and be provided for at the expense of the parish; and if, from the illness of the child, or any accident happening to it, the expenses should exceed the

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(a) 1 Term. Rep. 101.

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weekly allowance, the parish would not have been indemnified. The statute 54 *Geo. 3*, c. 170, s. 8, which empowers overseers of the poor for the time being to sue, applies only to securities given for indemnifying a parish for the maintenance of bastard children; and here, the bond was not given to indemnify the parish officers for such maintenance, or the expenses occasioned by reason of the support of the child. Besides, the bond was not given to the plaintiffs or their immediate predecessors in office, but was a mere personal bond to the parish officers for the time being; and, as it was not taken in the usual form, the plaintiffs are precluded from suing upon it. *Lastly*, it is not a bond or security required to be given by the defendant under the statute 49 *Geo. 3*, c. 68, s. 2, as that section relates only to securities to indemnify the parish. The third plea, therefore, is a good answer to the action, as the plaintiffs provided for the child of their own wrong, after the defendant had requested them to deliver it over to his care; and he also alleged that he was able and willing to provide for it without the aid or assistance of the parish.

Mr. Serjeant *Bompas*, in support of the rule.—The third plea is bad in substance, as the defendant should not only have alleged that he was able and willing to maintain and provide for the child without the assistance of the parish, but that he had given the plaintiffs notice of that fact; and no such notice is averred. But the defendant, as the putative father, had no legal right to claim or have the custody of the child. In *Coke on Littleton* (a), it is said, “a bastard is *quasi nullius filius*, and therefore he can take no remainder until after he has gained a name by reputation. That rule was adopted and acted on in *Earle v. Wilson* (b), and *Wilkinson v. Adam* (c), where it was laid down that a bastard cannot take as the issue, or by the description of child of his reputed father, until it has

(a) Page 3. b.

(b) 17 Ves. 531.

(c) 1 Ves. & Bcam. 466.

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acquired the reputation of being such child. Previously to the passing of the statute 18 *Elizabeth*, c. 3, which empowered two magistrates to make an order on the mother or reputed father, to maintain the infant, by weekly payments or otherwise, the father was only bound to provide for the child by a moral duty, and he was not liable to maintain it, although he became the reputed father by adoption. Here, the defendant entered into the bond *voluntarily*; and, as the child was given up to the parish officers in the first instance, the defendant could not afterwards take it from them. It is in the discretion of the magistrates to determine whether they will make an order or not; and here the mother went before a Justice, and declared on oath that the defendant was the father of the child, upon which he was bound to indemnify the parish, and he entered into the bond accordingly. The weight of authority is decidedly against the right of the father to have the custody of the child. In *Newland v. Osomond*, Mr. Justice *Foster* doubted whether the putative father might take his child and maintain it himself, and in the case of *The King v. Soper*, Lord *Kenyon* expressly said that he had no right to the custody of the child. In *Hulland v. Malkin*, Lord Chief Justice *Wilmot* said, he would give no opinion whether the father has any power over the child, who is *nullius filius*. In *Richards v. Hodges*, the point was not spoken to by the Court, as the only question was on the form of the rejoinder, which was held to be a departure from the plea. The case of *Ex parte Knee* (a), is an authority to shew that the mother is entitled to the custody of her illegitimate child in preference to the father, although he might be better able to educate it; and the cases of the *King v. De Manneville*, and *The King v. Moseley*, are expressly in point as to the right of the mother, in preference to the father. In *Hays v. Bryant* (b), it was held

(a) 1 New Rep. 148.

(b) 1 Hen. Bl. 253.

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that parish officers are obliged to provide necessaries for a bastard child, without an order of Justices for that purpose; and here it was agreed between the parish officers and the defendant as to the sum the latter was to pay weekly, for the support of the child, and the bond was given to indemnify the parish to that extent; and the case of *Middleham v. Bellerby* (a), is an authority to shew that it is a valid instrument, and available by the parish officers against the obligor. There, the putative father of a bastard child gave a *voluntary* bond to the parish officers, (and not under the compulsion of the statute 6 Geo. 2, c. 31), conditioned for the payment of 1*l.* 19*s.* every three months, until the child should be *deemed* capable of providing for itself, and it was held that such bond was good, and the condition sufficiently certain; and Lord *Ellenborough* said—" Looking to the obligation, it amounts to this, that the putative father of an illegitimate child is willing to pay to the parish officers a reasonable sum for every three months, until his child is deemed capable of providing for itself. I see nothing in this against public policy, and it does not seem to me to be a case within the statute." The only distinction between that case and the present is, that there the payments were to be made quarterly, and here weekly. The statute 54 Geo. 3, c. 170, being a remedial act, ought to receive a liberal construction, and the 8th section, which empowers overseers of the poor to sue on securities given to indemnify the parish against parish children, ought not to be narrowed so as to exclude a bond of this description; and in *Addey v. Woolley* (b), it was held that an action on the indemnity bond must be brought in the names of the overseers for the time being, and not of those to whom the bond was given.

Cur. adv. vult.

(a) 1 Mau. & Selw. 310.

(b) 3 J. B. Moore, 21.

Lord Chief Justice TINDAL now delivered the judgment of the Court as follows :—

This question comes before the Court upon a motion on the part of the plaintiffs, for leave to enter up judgment for the sum of *5*l.* 2*s.* 6*d.**, being the amount of damages assessed by the Jury upon a bastardy-bond, notwithstanding the verdict found by the Jury for the defendant on the third plea. The bond was not in the usual form of such bonds given in compliance with the statute, a bond to indemnify and save harmless the parish officers, and their successors, against all costs, charges, and expenses which they might incur by reason of the birth and maintenance of the bastard child; but it was a bond conditioned “to pay the parish officers a weekly sum of *2*s.* 6*d.** for and on account of all such costs, charges, and expenses; the said sum to be paid weekly and every week for and during so long time as the said bastard child should continue to live and be provided for at the expense of the said parish.” And upon shewing cause against the rule, two objections were made to the plaintiff’s right to recover—*first*, that the bond was not an indemnity bond, and therefore no right of action passed to the present plaintiffs, who sue as successors to the obligees; and *secondly*, that the bond, not being given as an indemnity bond under the statute, is void at law. As either of these objections, if well founded, would prevent the necessity of considering the question raised by the plaintiff’s motion, it will be better to consider them first in point of order. Now, as to the first objection, we think the legal construction of the bond is, that it is a bond of indemnity to a limited extent. The condition begins by reciting, “that the defendant, in order to indemnify the parish from the maintenance of the said child as much as in him lay, had applied to the churchwardens and overseers to take his security for the maintenance of the said child, which they had consented to do as thereinafter mentioned;” and it then proceeds to recite,

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“and therefore, that he had entered into that his bond for the payment of the sum of 40*s.* for the month's lying in, and the payment of the weekly sum of 2*s.* 6*d.* from the expiration of the said month, for the support of the said bastard child so long as he should continue to be provided for at the expense of the said parish.” And this recital shews sufficiently the intention of the parties, that the parish should be indemnified up to a certain extent, an extent, probably, calculated with reference to the condition and means of the defendant. But the statute 54 *Geo.* 3, c. 170, s. 8, by which succeeding officers are enabled to sue on parish securities, is not restrained to the case of indemnity bonds, strictly and properly so called, but it enacts, in more general words, “that all securities given for indemnifying any parish for the maintenance of any bastard child, or any expenses in any way occasioned to such parish by reason of the birth or support of any bastard child born within such parish, or chargeable thereto, shall be vested in the overseers, &c., for the time being.” It would, therefore, as it appears to us, be too narrow a construction of a statute intended to be remedial, if we were to hold the present bond, intended by the parties to be an indemnity to a limited extent, and a description of security well known to be in use at the time the statute passed, not to be within the operation of the act.

As to the second objection, after the case of *Middleham v. Bellerby* (a), we think the present bond is a valid security. The bond is not given under the statute 49 *Geo.* 3, c. 68, s. 3. There is no proceeding against the putative father under that statute, to compel him to give security: but, after the voluntary examination of the woman, the putative father gives a voluntary security for the payment of a weekly sum, so long as the bastard child should continue to live and be provided for by the parish. Such a

(a) 1 *Mau. & Selw.* 310.

security has been held to be legal, in the case referred to; it is a species of security in ordinary use, and there seems no reason, on general principle, why it should be held void.

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The question, therefore, arises, and must be considered by us, whether the plaintiff is entitled to recover, notwithstanding the verdict on the issue raised on the third plea; that is, in other words, whether the third plea discloses no matter of legal defence to the action, though every allegation contained in it be admitted to be true. The broad objection that has been taken to the plea is, that the putative father has no right, by law, to the custody of the bastard child; that it is equally against law and policy that the parish officers should deliver up the child upon his request; and, consequently, that, as the legal obligation upon the parish to provide for the child's maintenance still remains, the offer to take him back will not relieve the putative father from his bond to indemnify the parish.

No decided case has been cited in support of this proposition, and, perhaps, on consideration of the authorities referred to, they would rather make against than support it. In the view, however, which we take of the present case, it becomes unnecessary to decide the point. For the question in this case does not arise in an action upon a bond conditioned in terms to indemnify the parish, in which, by the rules of pleading, the defendant may answer the action by pleading specially what had been done under the condition, and conclude by saying, that, if the plaintiff is damnified, it is by his own fault; but this is an action brought upon a bond conditioned for the performance of one particular duty, *viz.* that the defendant should pay to the parish officers the weekly sum of 2*s.* 6*d.*, for and on account of all rates, costs, charges, and expenses, which might in any manner happen, &c., "the said sum of 2*s.* 6*d.* to be paid weekly, and each week, for and during

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so long time as the said bastard child should continue to live, and be provided for at the expense of the said parish." Under such a condition, the plea, and the only plea, is performance, to which the present plea does not amount; for, it is clear, upon the face of the declaration, that the child continued to live and be provided for, at the expense of the parish. This being a bond not given under the statute 49 *Geo. 3*, must be considered as a voluntary bond between the parties; and, if a bond given voluntarily, it was competent for the parties to introduce any qualification into the condition, as to the power of the putative father to demand the bastard child, when he was willing and able to support it, and as to the ceasing of his liability in case of refusal to deliver up the child. There is, however, no such provision, but the express condition before stated. To introduce such a term into the condition, would be not only adding to the written contract between the parties, but violating the apparent intention of the parties, which was, that, if the parish took the child, under the terms of this bond, the father should agree to leave the child in their hands, so long as it required to be maintained. The bond, therefore, being thus conditioned, we think the statement in the plea, of facts from which the inference is drawn, that the plaintiffs, if damnified, are damnified of their own wrong, forms no answer in point of law to an action on the bond; and we think the rule ought to be made—

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Cook and Another, Assignees of BAKER, a Bankrupt,
v. ROGERS.

Tuesday,
May 3rd.

THIS was an action of *assumpsit* for money had and received. At the trial, before Lord Chief Justice *Tindal*, at *Westminster*, at the Sittings after the last Term, it appeared that in *January*, 1820, the defendant, a silk mercer at *Birmingham*, sold to *Baker*, the bankrupt, a house and good-will of a shop there, for the sum of 4000*l.*, 600*l.* of which were to be paid by a bill of exchange, drawn on the 26th of *March*, 1829, by *Baker*, upon and accepted by his father, payable at six months after date; which bill accordingly became due on the 29th *September*, 1829; that *Baker* having commenced business with scarcely any capital of his own, his circumstances soon became desperate, and, by the 18th *September*, four writs had been sued out against him, upon one of which he was arrested, and gave bail; that, on the evening of that day, he was to receive 970*l.* for the good-will and stock of a shop he had sold at *Wolverhampton* to supply his immediate wants; that the defendant, who had before threatened to arrest *Baker*, if the 600*l.* bill were not paid when it became due, called upon him in the afternoon of the 18th *September*, and told him that he was fooling him, and that he would not be fooled any longer, but that he would arrest both *Baker* and his father, if the bill were not paid on the 29th; that the defendant called again upon *Baker* on the morning of the 19th, and, being more importunate than on the preceding day, *Baker* paid him the 600*l.*, by

In an action by assignees of a bankrupt for money had and received, it appeared that the bankrupt was indebted to the defendant on a bill of exchange, drawn by the bankrupt upon, and accepted by, his father; that, ten days before the bill became due, the defendant threatened to arrest the bankrupt and his father, if it were not paid; when the bankrupt paid the amount to the defendant. On the bankrupt being called as a witness, he stated that his object in paying the defendant was, to secure his (the bankrupt's) father, and at the same time to benefit the defendant; that he did not recollect that the defendant had used any threat, and that he did not contemplate bankruptcy at the time: but he committed an act

of bankruptcy a few hours afterwards. It was left to the Jury to say, whether, under all these circumstances, the payment was made in contemplation of bankruptcy, and voluntarily, or in consequence of a threat from the defendant; and that it was for them to consider what was passing in the bankrupt's mind at the time of the payment, and the probable motives by which he was actuated:—*Held*, that such direction was proper; and the Jury having found that the payment was voluntary, the Court refused to disturb the verdict.

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giving him a bill of exchange for 200*l.*, and 400*l.* in cash, being part of the sum which he had received the evening before from the sale of his property at *Wolverhampton*. That payment, however, was not sufficient to relieve him from his difficulties, or to induce him to hope that he might continue his business at *Birmingham*; and in the evening he committed an act of bankruptcy, upon which a commission was sued out against him on the 30th. On *Baker* being called as a witness, he stated that his object in paying the 600*l.* to the defendant on the 19th was, to secure his father, and at the same time to benefit the defendant; that he did not recollect that the defendant had made use of any threat; and that, if he had, it would have had no effect upon him; that he did not precisely know the state of his accounts on the morning of the 19th, but he did not then contemplate bankruptcy, although he might have thought that he would be able to come to some arrangement with his creditors; but that, on the evening of that day, he was advised by his attorney to become a bankrupt, and that he committed an act of bankruptcy accordingly.

His Lordship left it to the Jury to say, whether, under all these circumstances, the payment of the 600*l.* by *Baker* to the defendant, on the 19th *September*, was made in contemplation of bankruptcy, and voluntarily; or in consequence of any threat from the defendant;—and he also told them, that they were to consider what was passing in *Baker's* mind at the time of the payment, and the probable motives by which he was actuated. They found that the payment was voluntary, and accordingly returned a verdict for the plaintiffs, damages 600*l.*

Mr. Serjeant *Adams*, on a former day in this term, obtained a rule *nisi* that this verdict might be set aside and a new trial had, on two grounds: *First*, on a misdirection of his Lordship to the Jury; and *secondly*, that the verdict was against evidence. The bankrupt stated, that

he did not contemplate bankruptcy at the time he made the payment to the defendant on the 19th *September*; and what was passing in his mind, or the motives by which he was actuated, are altogether immaterial. It is quite clear that the payment was made in consequence of the threats held out by the defendant; it must therefore be considered as a compulsory, and not a voluntary payment; for the defendant had said, that he would arrest both *Baker* and his father if the 600*l.* bill were not paid on the day it became due, and that he would be fooled no longer. The Jury, therefore, should have been directed, that, in point of law, this was a payment by compulsion, which would have been a valid payment. The case of *Bayley v. Ballard* (a) is infinitely stronger than the present. There, a trader, in contemplation of bankruptcy, and without solicitation, put some cheques into the hands of his clerk, to be delivered to a creditor at his counting-house; but, before they were delivered, the creditor called upon the trader and demanded payment of his debt; and Lord *Ellenborough* held, that the intention to give a voluntary preference not being consummated, the payment stood good. In *Hartshorn v. Slodden* (b), a debtor, at the instance of his creditor, gave goods out of his shop, in part payment of a bond *not then due*, and shortly afterwards became bankrupt, and it was held, that the mere circumstance of the bond not being due, would not alone vitiate the part payment, on the ground of fraudulent preference; and Lord Chief Justice *Alvanley* there said (c): "It is not sufficient to avoid the delivery of goods by a trader, that such delivery be made voluntarily on his part, and that an act of bankruptcy ensues; it must also appear that he had the act of bankruptcy in contemplation at the time of the delivery. Nor has it ever been held, that, if a creditor press for payment of his debt, and thereby obtain goods, the intention of the bankrupt shall

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(a) 1 Camp. 416.

(b) 2 Bos. & Pul. 582.

(c) Id. 584.

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be called in aid to set aside the transfer. If the goods be delivered through the urgency of the demand or the fear of prosecution, whatever may have been in the contemplation of the bankrupt, this will not vitiate the proceeding." In *Crosby v. Crouch* (a), the act of delivering goods by a trader, to secure the defendant, who was under acceptances for him payable at a future day, having been made in consequence of the urgency of the defendant, (evidenced by the proposal for giving such security originating with him), it was held to be immaterial to consider whether the trader had his bankruptcy in contemplation at the time; nor would the transaction, being *bond fide*, and not colourable, be impeached by the secrecy with which the delivery was made by the trader, in order to save his own credit in the view of the world. At all events, whether a payment by a trader on the eve of bankruptcy be voluntary or compulsory, is a compound question of law and fact; and the mere circumstance of what may be passing in the mind of the party at the time of making such payment is immaterial:—if he pay a creditor under a threat, or by compulsion, such payment is protected, although made in contemplation of bankruptcy. The bankrupt here said, that he paid the defendant, in order to secure his, the bankrupt's father. That, therefore, was not a fraudulent preference. And in *Fidgeon v. Sharpe* (b) it was held, that, although a trader in embarrassed circumstances contemplates that his trade must cease, and that he cannot pay his creditors unless they give him time, he does not therefore necessarily contemplate bankruptcy: and here *Baker* declared that he had not bankruptcy in his contemplation when he made the payment to the defendant.

Mr. Serjeant *Storks* now shewed cause.—Whether the payment by *Baker* to the defendant, on the 19th

(a) 11 East, 256.

(b) 5 Taunt. 539; S. C. 1 Marsh. 196.

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of *September*, was made voluntarily, or by compulsion, was purely a question for the consideration of the Jury, and was left to them in terms; and there can be no doubt but that they came to a right conclusion on consideration of all the circumstances before them, in determining that it was a voluntary payment. What was passing in the mind of *Baker* at the time, or the probable motives by which he was actuated, were material circumstances for the Jury to consider, with a view to assist them in coming to a right conclusion on the point submitted to them. *Baker* commenced business with a trifling capital, and, considering the extent of his purchase from the defendant, and the general state of his affairs, he must have had bankruptcy in contemplation when he sold his property at *Wolverhampton*, to meet the pressing demands then made upon him. He had no chance of getting over his difficulties, and he must have known that his situation was past recovery. He himself said, that he thought he might come to some arrangement with his creditors, and he committed an act of bankruptcy a few hours after the payment in question was made. The bill for 600*l.* was not then due, and the defendant merely said that he would arrest *Baker* and his father if it were not paid; and *Baker* said, that he paid the money to secure his father, and at the same time to benefit the defendant. This, therefore, shews that the payment was a voluntary payment. In *Harman v. Fishar* (a), a letter of the bankrupt was produced, in order to shew that he meant to give a preference to a particular creditor; and the Court held, that the essential motive being to give a preference, the transaction was void, although in favour of a very meritorious creditor; and in *Thornton v. Hargreaves* (b), where a trader, on being pressed by a creditor for payment or security, gave a bill of sale of apparently the whole of his stock, and immediately left his business and home, and became a bankrupt, it was held,

(a) Cowp. 117.

(b) 7 East, 544.

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that, inasmuch as the act done did not redeem the trader from any present difficulty, which is the ordinary motive for such an act, when really done under the pressure of a threat, was evidence that it was not done under such pressure, but voluntarily, and with a view to prefer the particular creditor in contemplation of bankruptcy, and was therefore void, as against the assignees. In *Hartshorn v. Slodden*, there was no proof that the bankrupt meant to prefer the creditor, the only question being, whether the giving goods in part payment of a bond not due, was fraudulent; and in *Bayley v. Ballard* there was an intermediate demand by the creditor, "which," Lord *Ellenborough* said, "took it out of the cases hitherto decided upon this subject. There was an intention of giving a voluntary preference, but, that intention not having been consummated, the payment stands good." Here, however, the amount of the bill was paid before it was due, and the mere threat of an arrest could not have placed *Baker* in a worse situation than he then was; and, in *Fidgeon v. Sharpe*, it was decided, that, whether a trader in embarrassed circumstances, who delivers goods to a creditor in discharge of his debt, does it in contemplation of bankruptcy, is a question of fact for the Jury. No distinction can be drawn between goods and money; and here the Jury were warranted in coming to the conclusion, from all the facts before them, not only that *Baker* contemplated bankruptcy at the time of the payment to the defendant; but that such payment was voluntary, as the bankrupt himself stated that he paid the money to benefit the defendant.

Mr. Serjeant *Adams*, and Mr. Serjeant *Stephen*, in support of the rule.—The motives of the bankrupt in making the payment, or the state of his mind at the time, can form no criterion as to deciding the question whether he paid the money voluntarily, or in consequence of the threat of arrest held out by the defendant; and his own account of the mo-

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tives by which he was actuated ought to be received with great caution. It appears that the defendant was most anxious to obtain payment from *Baker*, and that he pursued him with great importunity the day previously to the payment; and if the bill for 600*l.* had been actually due, he could not have done more. In legal acceptation, a voluntary payment must be strictly so, and made without any threat on the part of the creditor; for, in *Crosby v. Crouch*, Lord *Ellenborough* said (a)—“Two things are necessary to concur, in order to avoid the delivery of the goods; namely, the purpose of voluntary preference in respect to such delivery, and the contemplation of bankruptcy at the time when the goods were delivered. In considering whether the act in question were in this sense properly *voluntary*, it is material to see from which party the proposition of making the deposit originated, whether from the bankrupt or from the defendant. It certainly proceeded solely from the defendant; he is stated to have *required* the act to be done. It is therefore, upon any fair interpretation of the words, not referrible to any supposition of favour and preference exercised on the part of the bankrupt, but to urgency and importunity applied on the part of the person obtaining the deposit; and it has not been suggested that such requisition and urgency were colourable.” That is expressly in point, and altogether applicable to the present case; and there was no evidence whatever of a fraudulent preference, for the bankrupt said, one of his objects in making the payment was, to secure his father, who was primarily liable as the acceptor of the bill, and whom the defendant had threatened to arrest, in case it were not paid on the day it became due. There is no statutory enactment to prohibit a payment made voluntarily and in contemplation of bankruptcy; but it has been deemed to be void, as being made in contemplation of a fraud, within the spirit and meaning of the bankrupt laws. Fraud is a mixed

(a) 11 East, 260.

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question of law and fact, and the doctrine of fraudulent preference is the creature of a Court of law; and here, as the creditor demanded payment of a just and *bond fide* demand, there is no ground for the Court to assume collusion between him and his debtor. The state of mind of the latter is of no consequence, and if he had been arrested, or obliged to pay by compulsion of law, there can be no doubt but that such payment would be protected; and as the defendant actually threatened to arrest both the bankrupt and his father, the payment must be taken to have been made compulsorily, and in consequence of such threat: and in *Ex parte Scudamore* (a) it was held, that a payment by a trader is valid, where he acts from the mere importunity of the creditor.

Lord Chief Justice TINDAL.—I agree in one observation which has been made by the counsel for the defendant, that the doctrine of fraudulent preference has arisen from the interpretation put upon it by Courts of law for the purpose of administering justice, rather than on the language of the different acts of Parliament which have been passed relating to bankrupts. In the case of *Herman v. Fishar*, which followed that of *Alderson v. Temple* (b), Lord Mansfield said (c)—“ There has been much argument upon a general question, whether a trader in contemplation of an act of bankruptcy can give a preference to a *bond fide* creditor. Perhaps, the stating it as a general question involves a great impropriety, because no trader can do an act of fraud, contrary to the spirit of the bankrupt laws, and to the injury of his creditors. He cannot assign his effects to all his *other* creditors, in exclusion of *one* whom he thinks dishonest or unjust, nor even to be equally divided amongst all his creditors; because he cannot take his estate out of that management which the law puts it into.” And in *Alderson v. Temple*, his Lordship

(a) 3 Ves. 85.

(b) 4 Burr. 2238.

(c) Cowp. 123.

said (a): "That it never entered into the mind of any Judge to say, that a man, in contemplation of an act of bankruptcy, could sit down and dispose of all his effects to the use of different creditors; for that would be a fraud upon the acts of bankruptcy." That doctrine has obtained ever since; and Lord *Eldon* once said, in the House of Lords, that this was a bold doctrine when it was first started, and, in some degree, a fraud on the acts of Parliament; because, if the statutes were insufficient in that respect, recourse should have been had to the Legislature; but that, after a course of concurrent decisions, for more than fifty years past, it was too late to infringe upon or alter the rule. But the doctrine has now found its way into the statute law; for the 82nd section of the statute 6 *Geo.* 4, c. 16, protects all *bona fide* payments made by bankrupts to their creditors, (such payments not being a fraudulent preference of such creditors). The questions in this case, then, are, *first*, whether, under all the circumstances, my direction to the Jury was correct; and, *secondly*, whether their verdict was a proper verdict. This is not a case of mere preference on the part of the bankrupt to a particular or favoured creditor, nor is it the equally simple case of a payment obtained by the threats or coercion of the creditor, without any sinister intention on the part of the debtor. It is a mixed case, and there was evidence on both sides. The bankrupt, on being called as a witness, said, he meant to benefit the defendant; but the defendant, before he knew of such an intention on the part of his debtor, had urged and importuned him for payment of the debt. There were, consequently, mixed motives operating upon the minds of both parties; and I am not able to discover any mode of ascertaining whether the payment on the 19th *September* was such as the law protects, but by putting it to the Jury to say, whether the payment was made voluntarily, and in contemplation of bankruptcy, or in consequence of any threat

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(a) 4 Burr. 2240.

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by the defendant. These two points I in substance left to them; and they were certainly at liberty to find, whether the payment was made by *Baker* to favour the defendant, or under the influence of his threats or pressure for the payment of his debt. But it has been urged for the defendant, that, wherever a threat by the creditor has been resorted to, there cannot be a fraudulent preference or voluntary payment by the debtor. But it appears to me, that that would be putting the question to the Jury in too constrained a manner, for it should be left to them to say, whether the threat had any operation on his mind or not. In *Thornton v. Hargreaves*, where a trader, being pressed by a creditor for payment or security, gave a bill of sale of apparently the whole of his stock, and immediately afterwards left his business and became a bankrupt, the Court held, that, inasmuch as the act done did not redeem him even from any present difficulty, which is the ordinary motive for such an act when really done under the pressure of a threat, it was evidence that it was not done under such pressure, but voluntarily, and with a view to prefer the particular creditor, in contemplation of bankruptcy. If, where a threat has been used, no other circumstance is to be inquired into, how came Lord *Ellenborough*, in *Thornton v. Hargreaves*, when the motion came before the Court for a new trial, to take all the facts proved at the former trial into his consideration, and to say (a)—“Taking the conversation reported between the defendants and the bankrupt to be a threat of process, if they did not receive payment or security for their demand, I do not see how the execution of such a threat could put the bankrupt in a worse situation than the actual transfer of the goods did; for that left him without any property, and he was immediately obliged to break up his business, and leave his home. This would rather shew that he did not make the transfer by dint of the threat; for he did not redeem himself even from any present difficulty by doing the act, which is the motive

(a) 7 East, 548.

for such an act, when really done under the pressure of a threat; and if he got nothing by evading the threat, I should rather say, that it was a voluntary act and preference on his part as to the particular creditors. Altogether, it is a very suspicious case, and fit to be further inquired into, and submitted to another Jury." That is conclusive to shew that his Lordship did not deem the mere circumstance of the threat a sufficient reason for shutting out the consideration of the other circumstances proved in the case. It therefore seems to me, that I was justified, under all the circumstances of this case, to leave both points open to the consideration of the Jury, *namely*, whether the payment in question was made voluntarily, and under contemplation of bankruptcy; or under fear or compulsion, from the threats used by the defendant. They found that the payment was a voluntary payment, and with a view to favour the defendant; and I do not see any sufficient ground to disturb their verdict.

Mr. Justice PARK.—This rule has been obtained on two grounds: *first*, on a misdirection of my Lord Chief Justice to the Jury; and *secondly*, that the verdict is against evidence. I cannot perceive any objection in law as to the mode in which the questions were left to the Jury; and if the points submitted to their consideration be correct in substance, the Court will not grant a new trial because some expressions might have fallen from the Judge, to call the particular attention of the Jury to the real question before them, or because he might have dilated more fully on the facts than counsel may think it was necessary for him to have done. What, then, is here complained of? It appears to me, that his Lordship left the case as favourably for the defendant as the facts permitted him to do. The simple question now is, was it proper to leave to the Jury the state of mind of the trader, and the probable motives by which he was actuated, when he made the payment to the

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defendant. That has always been done, since the case of *Harman v. Fishar*, which was decided in 1774; and in *Crosby v. Crouch*, Lord *Ellenborough*, being of opinion, upon the evidence given at the trial, that the security having been required of the bankrupt by the defendant, and not offered voluntarily by him, negatived the undue preference, and would have left the case to the Jury with that intimation; the plaintiffs' counsel submitted to a nonsuit, which the Court, after consideration, refused to set aside. The case of *Bayley v. Ballard* does not appear to me to be law; and Lord *Ellenborough* there went a length he had never before gone; for, the bankrupt, having borrowed 1400*l.* of the defendants, who were bill-brokers, and with whom he had been in the habit of dealing, left with them by way of security two bills of exchange on third persons, one for 270*l.* 10*s.*, and another for 1200*l.*, and three days afterwards he sent his clerk to the defendant's counting-house with three cheques, amounting to 1139*l.*, which the clerk delivered and said—"this is probably the last transaction we shall have together for some time; we are at a standstill." But as, after the cheques had been put into the clerk's hands for the above purpose, and before they were delivered, a demand was made upon the bankrupt by one of the defendants for the re-payment of the 1400*l.*, and on receiving the cheques they gave up the bill for 1200*l.*, his Lordship was of opinion, that it was not to be considered as a voluntary payment, and that, although there was an intention of giving a voluntary preference, yet, as such intent had not been consummated, the payment stood good. As, however, the sum was large, and no motion was afterwards made to the Court, that case is certainly entitled to some weight; but it is not necessary for us to impeach its authority, as here the case was compounded of a variety of transactions, which were abundantly sufficient to justify my Lord Chief Justice in adopting the course he took at the trial. Although the bill for 600*l.* was not due

when the payment in question was made, and the bankrupt said that he paid the money to secure his father, the payment to the defendant was necessarily to be deemed a voluntary payment; yet it was an ingredient in the case, and a material fact for the consideration of the Jury. There can be no doubt but that the debtor had bankruptcy in contemplation at the time of the payment, for he actually committed an act of bankruptcy a few hours afterwards. On the whole, therefore, it appears to me, not only that the question was most properly left to the Jury, but that they have come to a right conclusion from all the circumstances before them. I am strongly inclined to think that I should have found the same way, but, at all events, the verdict is not so manifestly wrong, as to induce us to disturb it.

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Mr. Justice GASHLEE.—I see no reason to find fault with the mode in which the question was left by my Lord Chief Justice to the Jury, or the observations he made to them in the course of his summing up. There can be no doubt but that the party making the payment to the defendant had bankruptcy in contemplation at the time; but the question is, whether it was a voluntary payment? I think it was not, and that the verdict is wrong, as being against the weight of evidence, if not the whole of the evidence in the cause. With reference to the rule laid down in several decided cases as to the criterion of voluntary payment, I should much like to see the question raised on the record, as it is highly desirable that there should be an uniform and consistent rule established on the point; but the cases on this subject are so conflicting, that it is impossible to reconcile them. It was originally decided, that, to make a payment by a trader voluntary, the offer must be made spontaneously by the debtor, without any solicitation on the part of his creditor. But, if the case of *Bayley v. Ballard* be law, it puts an end to the question; for there, a

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mere intervening demand by the creditor was held sufficient to prevent the payment from being deemed a voluntary payment, although the debtor had a clear intention to make the payment without any demand whatever, as he actually sent the cheques to the defendants before one of them called upon him for the payment of the debt; and here, the defendant not only made a demand, but actually threatened to arrest the bankrupt and his father if the bill were not paid, and which threat he repeated previously to the payment being made. In *Thornton v. Hargreaves*, although it was admitted on all sides that there had been a threat by the creditor, yet Lord *Ellenborough* considered that the other accompanying circumstances might and ought to be inquired into, and said, that they would rather shew that the bankrupt did not make the transfer by dint of the threat, for he did not redeem himself even from any present difficulty by doing the act, which is the motive for such an act, when really done under the pressure of a threat; and if he got nothing by evading the threat, his Lordship should rather say that it was a voluntary act and preference on the bankrupt's part, as to the particular creditors, and that, altogether, it was a very suspicious case, and fit to be submitted to another Jury. It is extremely difficult to say what is meant by an act done under pressure of a threat, for, in that case, there was no actual pressure or urgent demand. In *Hartshorn v. Slodden*, Lord Chief Justice *Alvanley* said (a)—“ It is not sufficient to avoid the delivery of goods by a trader, that such delivery be made voluntarily on his part, and that an act of bankruptcy ensues; it must also appear that he had the act of bankruptcy in contemplation at the time of the delivery. Nor has it ever been held, that, if a creditor press for payment of his debt, and thereby obtain goods, the intention of the bankrupt shall be called in aid to set aside the transfer. If the

(a) 2 Bos. & Pul. 584.

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goods be delivered through the urgency of the demand, or the fear of prosecution, whatever may have been in the contemplation of the bankrupt, this will not vitiate the proceeding." Difficulties have also been raised, where the debt in respect of which a payment is made, is not actually due at the time of such payment; and in *Singleton v. Butler* (a), where payment of a promissory note was defeated, on the ground of fraudulent preference, Lord *Eldon* partly distinguished the case from that of *Smith v. Payne* (b), by observing, that, in the latter, "the security was taken for a debt actually due." Here, not only was the 600*l.* bill not due, but the defendant had more than once threatened to arrest the bankrupt and his father, who was the acceptor, if it were not duly paid, and he also said that he would be fooled no longer. The verdict, therefore, not only appears to me to be against the weight of evidence, but that it will be productive of serious consequences to creditors, if it be allowed to stand.

Mr. Justice ALDERSON.—I entirely concur in opinion with my Lord Chief Justice and my brother *Park*. In every case of this description there are two points; the one, whether or not the payment has been made in contemplation of bankruptcy, the other, whether it were a voluntary payment. Both these are questions of fact, which must be left to the Jury upon the circumstances of each particular case, and the evidence adduced at the trial. If, then, whether the payment be voluntary or not, is a question of fact, all the authorities upon the subject appear to me to be reconcilable.

In *Crosby v. Crouch*, the delivery of the goods was so far from voluntary on the part of the trader, that it was made in consequence of the urgency of the creditor. Lord *Ellenborough*, therefore, thought it immaterial to consider

(a) 2 Bos. & Pul. 283, 583, n.

(b) 6 Term Rep. 152.

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whether the trader had bankruptcy in contemplation at the time—"For," said his Lordship (a), "in considering whether the act in question, (namely, the delivery of the goods), was in this sense properly *voluntary*, it is material to see from which party the proposition of making the deposit originated, whether from the bankrupt or from the defendant, (the creditor). It certainly proceeded wholly from the defendant: he is stated to have *required* the act to be done. It is, therefore, upon any fair interpretation of the words, not referrible to any supposition of favour and preference exercised on the part of the bankrupt, but to urgency and importunity applied on the part of the person obtaining the deposit; and it has not been suggested that such requisition and urgency were colourable." So, in *Hartshorn v. Slodden*, Lord Chief Justice *Alvanley* said (b)—"Nor has it ever been held, that if a creditor press for payment of his debt, and thereby obtain goods, that the intention of the bankrupt shall be called in aid to set aside the transfer. If the goods be delivered through the urgency of the demand, or the fear of prosecution, whatever may have been in the contemplation of the bankrupt, this will not vitiate the proceeding." In *Thornton v. Hargreaves*, Lord *Ellenborough* said (c)—"I do not see that the threat, if carried into execution, could put the bankrupt in a worse situation than the actual transfer of the goods did: for that left him without any property, and he was immediately obliged to break up his business, and leave his home. This would rather shew that he did not make the transfer by dint of the threat, for he did not redeem himself even from any present difficulty by doing the act. And if he got nothing by evading the threat, I should rather say that it was a voluntary act and preference on his part, as to the particular creditors; and, therefore, that it was a suspicious case, and fit to be submitted to another Jury." It therefore seems to me, that the motives of the bankrupt may be

(a) 11 East, 260.

(b) 2 Bos. & Pul. 585.

(c) 7 East, 548.

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more or less material, according to the situation in which he is placed at the time of the delivery of goods, or payment of money to a creditor, as well as to the nature of the threat, and the degree of the urgency of the demand. We also find, that in cases where goods have been delivered, or payment made by a trader to his creditor before the debt is due, it has sometimes been relied on as an indication that the payment is voluntary; and, at other times, contended that such a circumstance is immaterial; yet such a fact does not of itself furnish any certain criterion—it is merely an ingredient upon which the Jury are to form their own conclusion, before they come to a final determination. Threats and importunity on the part of the creditor are a strong circumstance to shew, that the payment that ensues is not voluntary; but if, as in this case, the debtor is not placed in a better situation by yielding to the threats, it affords a strong inference the other way. Here, there was evidence on both sides, and the whole of the facts were left to the Jury. The bankrupt could not be put in a worse situation by the defendant's threatening to arrest him if the bill were not paid when it should become due. It was therefore most material to ascertain, if possible, the motives by which the bankrupt was actuated when the payment was made. I do not see how the questions could have been left more fairly or more properly to the Jury, neither am I prepared to say that they came to a wrong conclusion. It is far too broad a proposition to say that the motives of the bankrupt are immaterial; for, in order to ascertain whether the payment was voluntary or not, it is material to consider the situation in which he was placed at the time. There can be no doubt, from his own statement, that he had bankruptcy in contemplation. On the whole, therefore, it appears to me, that we ought not to disturb the verdict, and, consequently, that the rule for setting it aside, and granting a new trial, must be—

Discharged.

1831.

*Tuesday,
May 3rd.*

A landlord cannot distrain unless the tenant actually hold under him, and at a rent certain. Where, therefore, the plaintiff and defendant entered into an agreement in writing, by which the latter agreed to let, and the former to take a lease of a house for a term of sixty years, at the yearly rent of 25*l.*, the defendant agreed to complete the house, and make it fit for habitation, and to allow the plaintiff a certain sum towards erecting an oven, and the plaintiff entered and built an oven, but the defendant never completed the premises, nor did he call on the plaintiff for any rent for nearly four years from the time he took possession, and the plaintiff said he had the money ready, and that he was willing to pay what was due, but that he was entitled to de-

duct a certain sum for repairs, and that he wanted to have the house completed according to the covenant:—*Held*, that this was a mere conditional promise to pay the rent; and, no specific sum having been agreed to be paid to the plaintiff, that the defendant could not distrain.

REGNART v. PORTER.

THIS was an action of replevin.—The defendant in his avowry alleged, that the plaintiff, for four years next before and ending on the 24th *June*, 1830, and from thence until &c., held the dwelling-house in which &c., as tenant to the defendant, by virtue of a demise thereof to the plaintiff theretofore made, at and under the yearly rent of 25*l.*, payable quarterly; and because the sum of 100*l.* of the rent aforesaid, for four years ending as aforesaid, was due and in arrear from the plaintiff to the defendant, he well avowed the taking, &c.

At the trial, before Lord Chief Justice *Tindal*, at *Westminster*, at the Sittings after the last Term, the defendant, in support of his avowry, gave in evidence the following agreement, dated on the 20th *June*, 1826, and made between the defendant, *Thomas Porter*, of the one part, and the plaintiff, *Philip Regnart*, of the other part: *viz.*—

“*Thomas Porter* agrees to let on lease, and *Philip Regnart* agrees to take a lease, and execute a counterpart, of the house and premises situate and being at the north-east corner of *Poole Street* and *Bridport Place*, *Hoxton*, in the parish of *St. Leonard, Shoreditch*, for a term of sixty years from *Midsummer* next ensuing, at the yearly rent of 25*l.*, payable quarterly, clear of all deductions and abatements whatsoever, and to insure the said premises from fire; such lease to contain the same covenants as the other leases granted by *H. C. Sturt, Esq.*, in the same estate. And the said *Thomas Porter* agrees to complete the said house and premises, fit for habitation and occupation, with all proper locks, bolts, bars, and fastenings, forthwith.

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And the said *Thomas Porter* agrees to allow the said *Philip Regnart* 15*l.* towards erecting and completing an oven for the use of the shop, as a baker's, and to fix a bresummer in the back front window in the basement. And the said *Philip Regnart* agrees to erect and build a good and substantial oven, with all iron-work, labour, and materials, and to complete the same fit for use forthwith. The said rent to commence at *Michaelmas* day next ensuing. And it is further agreed, that each party doth bind himself, his executors, administrators, and assigns, to perform and execute the aforesaid covenants and agreements."

It appeared, that the plaintiff took possession of the premises at *Christmas*, 1826, and built the oven as stipulated for in the agreement; but the defendant never completed the premises, neither did he fix the bresummer in the back front window. The plaintiff, however, continued to occupy, from *Christmas*, 1826, to *Midsummer*, 1830, a week after which the defendant's son for the first time applied to him for the payment of the rent due, when the plaintiff said that he had the money ready, and that he was willing to pay what was due, but that he was entitled to deduct 3*l.* or 4*l.* for repairs; and he also said, that he wanted to have the house completed according to the terms of the agreement. For the plaintiff it was objected, that these facts were not sufficient to support the avowry; and the Lord Chief Justice being of opinion that the defendant had failed in proving that the plaintiff held under him at a rent certain, and that the defendant's offer to pay was conditional only, or a mere qualified admission, he directed a verdict to be taken for the plaintiff, damages 4*l.* 4*s.*, reserving leave to the defendant to move to set it aside; and that, instead thereof, a verdict might be entered for him for the amount of the rent due at the time of the distress, in case the Court should be of opinion, that, under the circumstances above stated, he had a right to distrain.

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Mr. Serjeant *Russell*, on a former day in this Term, accordingly obtained a rule *nisi*. Although, in *Dunk v. Hunter* (a), it was decided, that a landlord has no right to distrain, unless there be an actual demise to the tenant at a fixed and specific rent, and, therefore, that where a tenant was in possession under an agreement for a future lease, and no lease having been executed, and no rent subsequently paid, the landlord could not distrain; yet, in *Hamerton v. Stead*, Mr. Justice *Littledale* said (b):—“Where parties enter under a mere agreement for a future lease, they are tenants at will; and if rent is paid under the agreement, they become tenants from year to year, determinable on the execution of the lease contracted for, that being the primary contract.” Here, although no rent was actually paid, the plaintiff admitted that it was due, and assented to the tenancy; he is, therefore, liable to the defendant for the rent in arrear at the time of the distress: and, in *Cox v. Bent* (c), where a party entered into possession of premises under an agreement for a lease at a certain rent, and occupied them for more than a year, but paid no rent: and an account was afterwards delivered to him by the landlord, charging him with half a year’s rent, the amount of which he at first disputed, but admitted that half a year’s rent was due, and named the amount, and the account was altered accordingly:—it was held, that a yearly tenancy might thereby be implied, and that the landlord had a right to distrain.

Mr. Serjeant *Bompas* now shewed cause.—There can be no doubt but that the instrument of *June*, 1826, can only operate as an agreement for a lease, and not as an absolute or present demise, as the defendant agreed to complete the house forthwith, and to allow the plaintiff 15*l.* towards

(a) 5 Barn. & Ald. 322.

(b) 3 Barn. & Cress. 483.

(c) 2 Moore & Payne, 281.

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erecting an oven, which the plaintiff agreed to build. Besides, the rent was not to commence until *Michaelmas* ensuing the date of the agreement; and as the defendant failed to complete the house according to the stipulations therein contained, the only question is, whether there was a sufficient admission or agreement by the plaintiff to pay a certain rent for the term of four years, as alleged in the avowry. In *Hegan v. Johnson* (a), where a tenant was let into possession under an agreement for a lease at a certain rent before the lease was executed, it was held, that the lessor could not distrain for rent during the first year, as there was no demise express or implied; and here, the plaintiff did not enter on the premises till *Christmas*, 1826, which was six months after the date of the agreement. In *Cox v. Bent*, the tenant not only admitted the rent to be due, but named the amount, and the landlord's clerk altered the account accordingly, which the Court most properly held to be sufficient to raise a presumption of a tenancy from year to year. Here, however, there was no such admission; and a mere entry by a tenant under an agreement for a lease, will not entitle the landlord to distrain. If a purchaser of an estate enter under an agreement, and refuse to complete it, the landlord may eject him without a previous notice to quit. In *Dunk v. Hunter*, which is confirmatory of *Hegan v. Johnson*, Lord Chief Justice *Abbott* said (b)—“A party has no right to distrain, unless there be a fixed rent agreed upon; if that be not so, the law gives him a remedy by the action for use and occupation. There can be no distress, unless there be a contract for an actual demise at a specific sum.” There, as in this case, the instrument was only an agreement preparatory to a demise, and not an actual or absolute demise; and here the plaintiff was not bound to pay the rent as stipulated for by the lease, because the defendant had not

(a) 2 Taunt. 148.

(b) 5 Barn. & Ald. 325.

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completed the house according to the terms of the agreement. In *Knight v. Bennett* (a), the tenant not only occupied, but actually paid a certain rent for two years; here, however, there was merely a conditional offer by the plaintiff to pay rent when it should have been ascertained what sum was due; but the amount was never agreed upon, nor did the plaintiff admit that he owed any certain or fixed sum for rent; and although he said that he had the money ready, and was prepared to pay what was due, yet it was subject to the condition of the defendant's performing the terms of the agreement by completing the house, and allowing a certain sum which the plaintiff said he had been obliged to lay out in repairing the premises.

Mr. Serjeant *Russell* in support of his rule.—It is not necessary to disturb or entrench upon the authority of any decided case upon this point. It may be admitted, according to *Dunk v. Hunter*, that a landlord cannot distrain unless there be an actual demise to the tenant at a fixed rent; but Lord Chief Justice *Abbott* there said—"Where the language of the instrument is such, as to make it a valid contract until something further be done, such instruments have, in some cases, after an actual enjoyment under them, been held to amount to an actual demise." Here, the plaintiff entered, and continued to occupy the premises for four years without paying any rent; and when he was called on to do so, he said, that he had the money ready, and was prepared to pay what was due, on being allowed a certain sum he had laid out for repairs. The true distinction, as applicable to this case, was laid down by Mr. Justice *Littledale* in *Hamerton v. Stead*; and the case of *Cox v. Bent* is decisive to shew, that an assent by the tenant, that a certain sum was due for rent, is sufficient to authorize the landlord to distrain, although no rent had

(a) 11 J. B. Moore, 222; S. C. 3 Bing. 361.

been previously paid. There, the tenant claimed a deduction, which the landlord's clerk or agent agreed to allow; and here the plaintiff raised no objection to the amount of the rent demanded, but only claimed a certain sum to be deducted, which he had laid out in repairs. That case, therefore, is precisely in point, and the defendant was, under the circumstances, entitled to distrain. The verdict for the plaintiff must therefore be set aside, and a verdict entered for the defendant instead thereof.

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Lord Chief Justice TINDAL.—The question in this case is, whether there was sufficient evidence adduced at the trial, to shew that the plaintiff held the premises in question *as tenant to the defendant*, and *at a rent certain*. It was incumbent on the defendant to prove both these facts; for unless the plaintiff were tenant to him, and at a rent certain, he had no right to distrain. It is admitted that if there were any tenure or tenancy, it was not under the instrument given in evidence, as it contained no words of present demise, but was only an agreement for a future lease. It may also be conceded, on the authority of decided cases, that although an instrument may only amount to an agreement for a future lease, yet if a party enters under it, and pays or promises to pay a rent certain, or settles it in account, a *new* agreement may be inferred, under which the landlord may have a right to distrain. The only question in this case then is, whether, from the facts proved at the trial, the plaintiff had paid or agreed, or promised to pay a rent certain, or to settle it in account with the defendant? In such a case, the labouring oar is cast on the defendant, because he is the actor, he being the party at whose instance the distress is made. Let us then see whether the defendant produced any evidence at the trial, equivalent to the facts proved in the case of *Cox v. Bent*. It appears that the house for which the rent was sought to be recovered was incomplete at the time the agreement was entered

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into; for the defendant, as landlord, agreed to complete the house and premises fit for habitation, with proper locks, &c., forthwith; and, by another clause, he agreed to allow the plaintiff (the tenant) a certain sum towards erecting an oven, and to fix a bresummer in a window in the basement. But the defendant adduced no evidence to shew that he had completed the premises, or fixed the bresummer; and when we are called upon to inquire whether the tenant agreed to hold at the rent reserved by the proposed lease, it becomes a most material question to ascertain whether he had the full enjoyment, or, in other terms, whether he occupied as beneficially as he would have done, if the premises had been completed, and the bresummer fixed. Besides, the plaintiff was allowed to occupy the premises for nearly four years before he was called on for the payment of any rent; and when the defendant's son applied to him for rent, he said he had the money ready, and was willing to pay what was due. If, indeed, nothing else had been said by the plaintiff, there might be some ground for implying a promise to pay the rent in question; but the plaintiff also adverted to the terms of the agreement, and insisted on the previous performance of the stipulations therein contained on the part of the defendant as to completing the house; and he also claimed an allowance or deduction to be made of a certain sum, which he said he had been obliged to lay out in repairing the premises. This therefore shews, that the promise to pay the rent was conditional only, and not an absolute or unqualified promise. If, instead of distraining, the defendant had brought an action for the use and occupation of the premises, the Jury might have given a less sum than the 25%, reserved by the agreement. A landlord, therefore, before he resorts to the more speedy and effectual remedy by distress, should ascertain not only that the tenant holds or occupies under him, but that he holds at a fixed and certain rent.

Mr. Justice PARK.—After what has fallen from my Lord Chief Justice, it is only necessary for me to express my entire concurrence; for I can add nothing that will tend to a beneficial purpose. The defendant did not demand any rent for nearly four years after the plaintiff entered upon the premises, nor was any precise sum ever fixed or agreed on as the rent actually due.

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Mr. Justice GASELEE.—I am of the same opinion.

Mr. Justice ALDERSON.—Unless there be a demise at a rent certain, a landlord cannot distrain; and here the defendant cannot succeed, as he not only failed to prove the amount of rent, but did not shew that the plaintiff had ever agreed or promised to pay the rent claimed, or to settle it in account. If, indeed, the plaintiff had ever paid rent, he would thereby have fixed the amount. In *Cox v. Bent*, the tenant admitted that the rent was due, and named the amount, and the landlord altered his account accordingly. The tenant was therefore fixed, by admitting that a certain sum was due for rent; whilst here, there was only a conditional admission by the plaintiff, and no specific amount of rent was ever fixed on, or agreed to be paid. This rule, therefore, must be—

Discharged.

1831.

Thursday,
May 5th.

In the deed to lead the uses of a recovery, the premises were described as a moiety or halfendal of a messuage and three hundred acres of meadow; in the recovery, the words "or halfendal," were omitted: the Court allowed the recovery to be amended, by the insertion of those words after the word "moiety."

MANNERS, Vouchee.

MR. Serjeant *Taddy* moved, that a recovery, which had been suffered in 1756, might be amended, by inserting the words "or halfendal," after the word "moiety." It appeared by affidavit, that the lands and premises intended to be conveyed were divided by a writ of partition, shortly before the recovery was suffered; and in the deed to lead the uses, they were described as three messuages, and all that moiety or halfendal of one messuage, three hundred acres of meadow, and forty acres of pasture, situate &c. In the recovery, the words "or halfendal," were omitted. The learned Serjeant submitted, that there was a material distinction between the words, "halfendal" and "moiety;" that the former applied to one half of an acre of land, as fardingdeal or farundel of land is the fourth part of an acre; and in *Sheppard's Touchstone* it is said, that if an entire farm, from partition, be divided into two parts, each part is denominated a halfendal; and here the parties expressed their intention, by the introduction of that word in the deed to lead the uses, to which the other parts of the recovery may be made conformable, by allowing the amendment as prayed.

Lord Chief Justice TINDAL.—The words 'or halfendal,' immediately following that of 'moiety,' clearly indicate, and are explanatory of what estate the parties intended should pass by the recovery, at the time they executed the deed to lead the uses. The addition of the words *or halfendal* gives a different meaning to the word moiety, if it had stood alone; and we therefore see no objection to the amendment, particularly as it will make the recovery consistent with the deed.

Per Curiam.

Fiat.

1831.

ADDIS, Demandant; NORRIS, Tenant; POWER, Vouchee.

Thursday,
May 5th.

MR. Serjeant *Jones* moved that this recovery might be amended by altering one and inserting two additional baptismal names of the vouchee, who deposed that he was born at *Teneriffe*; that he had lately ascertained that he was baptized there by the name of *Patricio Nicholas Placedo Power*, but that he had assumed the name of *Patrick*, by which name he had always been called and known. The learned Serjeant referred to the cases of *O'Brien*, vouchee (a); and *White*, demandant, *Gregory*, tenant; *Herne*, vouchée (b), where the Court had permitted recoveries to be amended by inserting an additional Christian name of the vouchee. But it appearing that the vouchee had signed the deed to lead the uses by the name of *Patrick* only—

The Court refused to amend a recovery by inserting an additional Christian name of the vouchee, he having signed the deed to lead the uses by one name only.

The Court said, that there was nothing to amend by, and that he must execute a fresh deed. But that, if he had always used, and been called and known by the name of *Patrick* only, the amendment would be unnecessary. That, at all events, it was a mere technical objection.

And Mr. Justice *Gaselee* observed, that, in the case of *O'Brien*, vouchee, the Court permitted the warrant of attorney to be amended, which had been since invariably refused, as it was the act of the party.

The learned Serjeant therefore took nothing by his motion.

(a) 4 Taunt. 196.

(b) 8 Taunt. 27.

1831.

*Thursday,
May, 5th.*

In trover for wool, which the plaintiffs alleged the defendants had obtained by fraud, it appeared, that it had been purchased of the plaintiffs by one *D.*, as agent for Messrs. *W. & Co.*, and that they pledged it two days afterwards to the defendants, for an advance made by them to *W. & Co.*, through the intervention of *D.*, who acted as the agent of the defendants as well as of *W. & Co.* The plaintiffs, in order to shew that *W. & Co.* had obtained the wool without intending to pay for it, they being insolvent at the time of the purchase, and which *D.* was aware of, offered certain contracts in evidence, signed by *D.*; and his handwriting to them having been proved:—*Held*, that such contracts were admissible, without calling *D.* as a witness. And the Jury having found that the transaction between *D.* and *W. & Co.* was fraudulent, but that the defendants were not cognizant of the fraud, and that *D.* was their agent, as well as the agent of *W. & Co.*, and the plaintiffs obtained a verdict, the Court refused to grant a new trial, as the defendants were liable for the fraudulent acts and misconduct of their own agent.

IRVING, REID, and Others v. MOTLEY and Another.

THIS was an action of trover, and brought to recover nineteen bags of wool, of the alleged value of 1,200*l.*, in the possession of the defendants, and which the plaintiffs contended they had obtained by fraud. Plea—Not guilty.

At the trial, before Mr. Justice *Gaselee*, at *Guildhall*, at the Sittings after the last Term, it appeared that the wool was ostensibly purchased of the plaintiffs, who are merchants in *London*, on the 14th of *August*, 1829, by one *Dunn*, as the agent of Messrs. *Wallington & Co.*, *Blackwell Hall* factors in *London*, and that the plaintiffs caused it to be delivered to them on the 18th; that, on the 20th, *Wallington & Co.* forwarded it to the defendants, wool-staplers at *Leeds*, as a pledge or security for 1,400*l.* advanced on that day by the defendants to *Wallington & Co.*, through the intervention of *Dunn*, who acted as the agent of the defendants as well as of *Wallington & Co.* The plaintiffs, in order to shew that *Wallington & Co.* had obtained the wool without any intention of paying for it, they having, for a long time previously to the purchase, been in a state of the greatest embarrassment, and that *Dunn* was cognizant of their affairs, gave in evidence several written contracts of wools bought and sold, purporting to have been effected by *Dunn*, and which contracts were signed by him; when it was contended for the defendants, that *Dunn* himself should be called; but his signature to the contracts being proved, his Lordship allowed them to be received; when the plaintiffs put in a letter dated on the 13th *December*, 1828, signed and addressed by *Dunn* to the defendants, inclosing an invoice of forty-se-

ven bags of *German* wool, which *Dunn* stated to have been purchased by him on the defendants' account, but without mentioning the names of the sellers. The particulars were as follow:—

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Amount	-	-	-	-	-	2,756	15	11
Discount 5 <i>l.</i> per cent.	-			137	16	9		
Ditto 3 <i>l.</i> per cent. additional			82	14	0			
							220	10 9
Bill at two months	-					2,536	5	2

Dunn also stated in the letter that he had sold the same wools to *Wallington & Co.* at the same prices, payable by their acceptance at six months, two and a half per cent. discount. The plaintiffs then proved that the defendants drew a bill of exchange on *Wallington & Co.* for these wools, which bill was dated on the 13th *December*, 1828, payable at Messrs. *Jones, Lloyd, & Company*, at six months after date, for 2,683*l.* 17*s.* 6*d.*, which bill would become due on the 16th *June*, 1829. The plaintiffs then called a witness of the name of *Duthwait*, who stated, that he was a clerk to *Wallington & Co.*, that the contracts entered into by *Dunn* were real contracts, and the clerk also proved his signature to the above letter; that *Wallington & Co.* were the sellers of the wool in question, as well as the purchasers; but that the object was to raise money for *Wallington & Co.* at a loss of nearly 10*l.* per cent. The witness further proved, from entries made in their books, that in five several instances, during the year 1829, wools had been purchased by *Wallington & Co.* through the agency of *Dunn*, of different merchants, upon credit, and sold again on the same or the following day, for the same prices at which they had been bought, but with an allowance of discount, in consequence of being sold at a short credit, making an actual loss on each transaction of 10*l.*, and, in two cases, of

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12*l. per cent.*, and he further stated that the house of *Wallington & Co.* was mixed up with several others in extensive accommodation transactions, which were effected through the medium of *Dunn*. It was also proved, that, on the bill for 2,683*l. 17s. 6d.* becoming due on the 16th *June*, it was renewed by the defendants, who drew two other bills in lieu thereof on *Wallington & Co.*, the one for 1,354*l. 15s. 1d.*, at two months after date, which became due on the 19th *August*, the other for 1,360*l. 9s. 6d.*, which fell due on the 19th *September* following; and that, on the defendants being requested to advance the 1,400*l.* on the 18th *August*, being the day before the first of *Wallington & Co.*'s renewed bills for the purchase of the wool on the 13th *December*, 1828, became due, they, suspecting the solvency of *Wallington's* house, required a deposit of wools by way of security, upon which *Dunn*, who acted as the agent of the defendants and of *Wallington & Co.*, obtained the wool in question from the plaintiffs, and transferred it as above stated; but it was not proved that the defendants had any knowledge of the sellers of the wool, or that it had originally been purchased of the plaintiffs. The house of *Wallington & Co.* stopped payment on the 29th *August*, 1829, and a commission of bankrupt was sued out against them on the 5th *September* following.

The learned Judge having summed up the whole of the evidence to the Jury, they found that the transaction between *Dunn* and *Wallington & Co.* was fraudulent, but that the defendants were not cognizant of the fraud; and that *Dunn* was their agent, as well as the agent of *Wallington & Co.*; and they returned a verdict for the plaintiffs, damages 933*l.*; leave being reserved to the defendants to move to enter a nonsuit, in case the Court should be of opinion, that, under all the circumstances, the plaintiffs were not entitled to recover.

Mr. Serjeant *Taddy*, on a former day in this term, ac-

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cordingly obtained a rule *nisi*, that this verdict might be set aside, and a nonsuit entered, pursuant to the leave reserved; or that a new trial might be had.—*First*, the plaintiffs ought to have called *Dunn* as a witness, as the wool in question was purchased through his means for Messrs. *Wallington & Co.*, and the proof of his signature to any previous contract ought not to have been admitted. Although he acted as the agent or broker of the defendants, as well as of *Wallington & Co.*, yet the defendants did not know from whom the wool was purchased, and the Jury expressly found that they knew nothing of the fraud between *Wallington & Co.* and *Dunn*, who deceived both the plaintiffs and the defendants. Although the witness *Dutchoit* proved the mode of dealing carried on by *Wallington & Co.* from entries made in their books, yet such entries were frequently made by other clerks; and the plaintiffs, in order to establish their case, should have called *Dunn*, who was alone privy to the transaction. In the case of *Gosling v. Birnie*, which was tried before Mr. Justice *Alderson*, at *Guildhall*, at the sittings after the last term, where a written paper, containing the terms of a contract which the broker effecting it had signed, was offered in evidence, that learned Judge ruled, that the broker himself should be called, in order to prove such contract.—*Secondly*, the verdict was against evidence; for, although, as between *Dunn* and *Wallington & Co.*, the wool might have been obtained from the plaintiffs by fraud, yet the defendants were not implicated in the transaction. *Dunn* was only their agent for the *bonâ fide* purchase and sale of wools, and they had nothing to do with the manœuvres or contrivances between him and *Wallington & Co.*; and, as the Jury expressly negatived a fraud in fact in the defendants, they are entitled to retain the wool; particularly, as it was delivered to them so long before the bankruptcy of *Wallington & Co.*: therefore, the right of the defendants to hold it ought not to be

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impeached. In *Noble v. Adams* (a), *A.*, of *London*, being in danger of insolvency, went to *Glasgow* and obtained goods from *B.*, which he paid for by a bill on a house in *London*, which he knew to be insolvent. The goods were shipped at *Leith* (the invoice and receipt from the shipowners being made out to *A.*), and were delivered to *C.*, a wharfinger in *London*, who afterwards received notice to hold them for *B.*—*A.* became bankrupt, and in an action of trover by him against *C.*, for the benefit of the assignees, it was held that there was not such conclusive evidence of fraud on the part of *A.* as to avoid the contract; and Lord Chief Justice *Gibbs*, in delivering the opinion of the Court, said (b)—“Without defining exactly what may or may not amount to such a fraud as would render the sale in question absolutely void, we are of opinion, that the evidence, as it stands, does not shew any conduct on the part of the plaintiff, sufficient to convince us that the transaction was void: and unless his representations amounted to the offence of obtaining goods under false pretences, we cannot take upon ourselves to say that the contract was altogether void:” and here the Jury have found in terms that the defendants did not know of the fraud, nor were they cognizant of the transaction or dealing between *Dunn* and *Wallington & Co.* with regard to the wool in question.

Mr. Serjeant *Wilde* and Mr. Serjeant *Russell* now shewed cause.—Although the wool was obtained from the plaintiffs by *Dunn* on an apparent sale to *Wallington & Co.*, yet it was merely to procure an advance of money to them by the defendants, for whom *Dunn* also acted as agent. The whole of the transaction was bottomed in fraud, and the terms of the renewal of *Wallington's*

(a) 2 Marsh. 366; 3. C. 7 Twant. 59.

(b) 2 Marsh. 370.

bill for 2,683*l*. by the defendants were evidently usurious. It is quite clear that, in point of law, there was no sale of the wool by the plaintiffs to *Wallington & Co.*; for the facts proved at the trial are abundant to avoid the contract, and to shew that nothing passed by the delivery of the wool to *Dunn*; and the plaintiffs were altogether ignorant of the circumstances under which the supposed purchase was made on account of *Wallington & Co.* It was incumbent on the plaintiffs to shew the fraudulent means by which *Dunn* had procured the wool, and that, when he effected the sale, he must have known that *Wallington & Co.* did not intend to pay for it; and as the defendants required a consignment of wools to be made to them by way of security for the sum to be advanced to *Wallington & Co.*, and *Dunn* obtained the wool from the plaintiffs by fraud, it vitiated the purchase altogether; and, as the wool was procured against good faith, the defendants can have no lien upon it; and the fraud between *Dunn* and *Wallington & Co.* might be shewn by their acts in similar transactions; and for that purpose the letter written by *Dunn* to the defendants, in December, 1828, was produced, to which his signature was attached, and his hand-writing having been proved, it was properly received in evidence. Besides, it was proved from entries in the books of *Wallington & Co.*, that, in several other instances, in the year 1829, wools had been bought by them through their agent *Dunn*, and sold on the same day at an enormous loss, for the sole purpose of keeping up their credit, *Dunn* himself knowing that they were in insolvent circumstances at the time. The plaintiffs could not call *Dunn* as a witness, as they wished to shew that he acted in concert with the defendants, and was engaged in the fraud; and the only object in giving the letter in question in evidence was, to shew that he was privy to the transactions carried on through him on behalf of *Wallington & Co.*, and that he must be aware of their circumstances at the

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time the purchase in question was made. In *Noble v. Adams*, and *Gosling v. Birnie*, the identical contracts were relied on and offered in evidence; but here *Wallington's* clerk proved that the contracts entered into by *Dunn* on their behalf had been adopted and acted upon by them, and the Jury found that the transaction in question was fraudulent. Although, in *Parker v. Patrick* (a), it was held, that, if goods be obtained from *A.* by fraud, and pawned to *B.* without notice of the fraud, and *A.* prosecuted the offender to conviction, and got possession of the goods, *B.* might maintain trover for them; yet the authority of that case has been since questioned. At all events, it is distinguishable from the present, as here the wool was obtained from the plaintiffs by *Dunn*, who acted as the agent of the defendants, to whom it was ultimately transferred; and they were possessed of it at the time the present action was brought; and as no property passed to them, the whole of the transaction being fraudulent, the plaintiffs were entitled to recover. In *Glyn v. Baker* (b), the plaintiffs and defendant having each lodged their respective *India* bonds with the same bankers, who afterwards, privily, and without the defendant's authority, sold his bonds, and upon his demanding them, delivered up to him the *India* bonds of the plaintiffs to the same total amount, and payable to the same obligee; although the defendant did not know that they were the property of another, but was told by the bankers that they had exchanged his original bonds for them—it was held, that the defendant having sold the plaintiffs' bonds so received from his own agents, who had acted *mala fide* in passing them to him, was liable to answer over to the plaintiffs for the amount. That case is decisive to shew, that the defendants could not obtain a title to the wool in question, which was obtained from the plaintiffs through the fraud of their own agent. And in *Doe*

(a) 5 Term Rep. 175.

(b) 13 East, 509.

d. Willis v. Martin (a), it was expressly decided, that fraud will vitiate any transaction, although the principal do not personally take any part in the fraud: if his agent do, it is sufficient; on the ground, that the principal is civilly responsible for the acts of his agent; and here *Dunn* not only acted as the agent of the defendants, but was acquainted with the whole of the transactions of *Wallington & Co.*, and the plans they pursued to procure wools from third persons, for the sole purpose of keeping up their credit; and evidence of these transactions was admissible, not for the purpose of proving the precise contract as to the purchase of the wool in question, but to shew the conspiracy which had been and was then existing between *Dunn* and *Wallington & Co.* Besides, *Dunn* was clearly an interested witness, and he was not bound to answer any question that might tend to criminate himself; and the case of *Corking v. Jarrard* (b) is an express authority to shew that he could only be rendered competent by a release, which must be actually produced at the trial; and when the plaintiffs shewed that he was interested by being privy to the fraud, and that he would have been exonerated in case of their recovering as against the defendants, secondary evidence of his acts was admissible; and, as the plaintiffs were deprived of their goods through his fraud, they were entitled to recover from the defendants, although *Dunn* had not acted as their agent; for, in *Ferguson v. Carrington* (c), where the defendant purchased goods upon credit, fraudulently intending at the time of the contract not to pay for them, and the vendor brought *assumpsit* for goods sold and delivered, before the time of the credit had expired, Lord *Tenterden* was of opinion, that, if the defendant had obtained the goods with a pre-conceived design of not paying for them, no property passed to him by the contract of sale, and that it was com-

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(a) 4 Term Rep. 39.

(b) 1 Camp. 37.

(c) 9 Barn. & Cress. 59.

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petent to the vendor to have brought trover, and to have treated the contract as a nullity, and to have considered the defendant not as a purchaser of the goods, but as a person who had tortiously got possession of them. In the case of the Earl of *Bristol v. Wilmore* (a), it was held, that, if a vendee contract for and obtain possession of goods with a pre-conceived design not to pay for them, it would be such a fraud as to vitiate the sale, and would prevent the property from passing to him; and that, whether he obtained possession of the goods with such a pre-conceived design, was a question of fact for the Jury; and, as it had not been left to them, the Court directed a new trial: and, in *Abbotts v. Barry* (b), it was decided by this Court, that a sale of goods effected by fraud does not change the property in them. There, the defendant had fraudulently colluded with a person who was in insolvent circumstances, to obtain wines from the plaintiff, the proceeds of which eventually came to the defendant's hands, in satisfaction of a debt before due to him from the insolvent; and it was held that the plaintiff was entitled to recover, in an action for money had and received; and Mr. Justice *Park* there referred to a MS. note of *Corking v. Jarrard*, where a female servant had been furnished with money by her master to pay bills and purchase goods, which she had misapplied by insuring in the lottery; Lord *Ellenborough* held, that the master might recover back the whole of the money he had entrusted her with, from the lottery-office keeper, as money had and received, and that the decision was founded on the authority of *Clarke v. Shee* (c), where it was held, that money had and received would lie by the true owner of money or notes, against a third person, into whose hands they had come *malâ fide*, provided their identity could be traced and ascertained; and here, the plaintiffs' wool was found to be

(a) 1 Barn. & Cress. 521; S. C.
2 Dowl. & Ryl. 755.

(b) 5 J. B. Moore, 98.
(c) Cowp. 197.

in the possession of the defendants, who had procured it through the instrumentality of *Dunn* as their agent, by whose fraudulent act it was procured in the first instance. On these grounds, therefore, the plaintiffs were entitled to recover, and the verdict for them ought not to be disturbed.

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Mr. Serjeant *Taddy* and Mr. Serjeant *Jones* in support of the rule.—Admitting, that, generally speaking, a party cannot acquire a title to the goods of another, where they have been procured through the fraud of his own agent; yet here, there was no evidence to shew that *Dunn* knew that *Wallington & Co.* would not pay for the wool at the time of the purchase. They had merely been in the habit of raising money by injudicious sales; and so far from shewing that the defendants had any knowledge of the transactions between *Wallington & Co.* and *Dunn*, the Jury expressly found that the defendants were wholly ignorant of the fraud; and, although the plaintiffs proved that wools purchased by *Wallington & Co.* from other persons were sold precipitately, and that losses were incurred in making such sales, yet it was no evidence of fraud. In *Glyn v. Baker* there was a palpable and indisputable fraud practised by the bankers; for, instead of giving the defendant his own bonds, they gave him bonds belonging to the plaintiffs, which had different numbers, and were for different separate sums, and were therefore manifestly distinguishable from the defendant's own bonds, which was sufficient to put him on his guard; and, as the bankers were his agents, he was held to be concluded by their *mala fides*, particularly as he knew the bankers had no authority to sell the bonds which he had deposited with them. In *Doe d. Willis v. Martin*, the Court said that there was a gross and infamous fraud, which rendered the whole transaction absolutely void, as well at law as in equity; and that, as it was practised by the agent of the purchaser, the latter was responsible

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as the principal. In *Abbotts v. Barry*, the defendant fraudulently colluded with the purchaser of the wines, whom he well knew to be in insolvent circumstances, and that he could not pay for them; but here, there was no evidence to shew that *Wallington & Co.* could not pay for the wool, or that they might not eventually be enabled to do so; and, unless goods be obtained by false pretences, the property in them will pass to the party to whom they are ultimately transferred. The case of *Noble v. Adams* is an express authority to shew, that, if a trader, being in danger of insolvency, obtains goods which he pays for by a bill of exchange drawn on a house which he knows to be insolvent at the time, and that it must necessarily be dishonoured, it is not such conclusive evidence of fraud on the part of the purchaser as to avoid the contract, or to prevent the property in the goods passing to him; for, as Lord Chief Justice *Gibbs* said (a)—“ Unless his representations amounted to the offence of obtaining goods under false pretences, we cannot take upon ourselves to say that the contract was altogether void.” In this case, there was not only no evidence offered of a direct fraud by *Dunn*, at the time of the purchase of the wool in question, but the Jury have found that the defendants were wholly ignorant of the transaction; which distinguishes this case from those which have been relied on for the plaintiffs. At all events, the letter written by *Dunn* to the defendants on the 13th *December*, 1828, ought not to have been received in evidence, although his signature to it was proved. It merely amounted to a declaration by him; and he either ought to have been called himself, as he was alone capable of explaining the transaction, or the terms of the contract which the letter purported to contain should have been proved by some person who was present at the time the sale was effected. Although, in

(a) 2 Marsh. 370.

Biggs v. Lawrence (a), in an action for goods sold and delivered, a written paper, by which the defendant's agent acknowledged the receipt of the goods, was admitted as evidence against his principal, yet in *Bauerman v. Rademius* (b), it was stated by counsel in argument, and not denied by the Court, that Lord *Kenyon* had frequently since ruled the contrary, without its ever having been questioned. At all events, the plaintiffs should have called *Dunn* as a witness, as he was the only person who could have proved the precise nature of the transaction to which his letter referred, and he might have refused to answer any question that might tend to criminate himself. In *Gosling v. Birnie*, Mr. Justice *Alderson* ruled, that the broker who made the contract must be called, although he had signed the bought and sold note; and here *Dunn* alone could prove the terms of the purchase and sale on the 13th December, 1828; and the entries in the books of *Wallington & Co.* were not admissible, unless the plaintiffs proved that they related to real and *bonâ fide* purchases and sales; which fact could only be ascertained through the testimony of *Dunn*, as he was the only party who was privy to those transactions.

Lord Chief Justice TINDAL.—This is an action of trover, by which the plaintiffs sought to recover nineteen bags of wool, which they proved to be in the possession of the defendants, and which the plaintiffs contend, under the circumstances, the defendants have no legal right to retain; on the ground that the wool was originally obtained from them, not under a real contract and sale, as it professed and appeared to be, but by means of the agent of the defendants, for a fraudulent purpose, viz. the procuring an advance of money to *Wallington & Co.* on the security of the wool, in order to enable them to take up an outstanding bill of exchange, and through

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(a) 3 Term Rep. 464.

(b) 7 Term Rep. 665.

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the fraud of such agent, endeavouring to give a colour of a contract and sale to what, in point of fact, was no contract at all. In order to establish the plaintiff's case, it was, of course, necessary for them to prove the circumstances of fraud on which they meant to rely; and, in order to do so, their counsel stated that there was a certain course or series of contracts for purchase, which, for a long time past, beginning in the month of *December*, 1828, and continuing down to a late period, had been entered into by a person of the name of *Dunn*, who acted as the agent of Messrs. *Wallington & Co.*, for whom the purchases were made, and who were the original debtors in those transactions: That *Dunn* having effected such purchases, there were forced sales, at a considerable discount, to raise ready money to meet the wants and embarrassments of *Wallington & Co.*; and that, after all this, the wool in respect of which the plaintiffs commenced the present action, was obtained from them for a like purpose, *Dunn* being fully aware, at the time the purchase was made, that *Wallington & Co.* would never pay for the wool. This was the outline or leading features of the fraud with which the plaintiff's counsel commenced their statement to the Jury; and in order to make it out, it became necessary to prove the existence of similar purchases; and, for that purpose, the plaintiffs offered in evidence several written contracts of wools sold and delivered, which purported to have been effected by *Dunn*. The first question for our consideration now is, whether this was admissible evidence of the contracts that purported to have been effected on the face of the written documents.

It was contended, in the first instance, that *Dunn* should have been called in order to substantiate these contracts; or that, at all events, if it were not necessary to prove them through him, it should be established, *aliunde*, that they were real and *bona fide* contracts, and not mere formal instruments in writing. But, taking the whole of the evidence together, it appears to me, that this was only one

step, to be followed up by others, as to the nature and existence of the contracts. The plaintiffs gave in evidence a contract made by *Dunn*, as the agent of *Wallington & Co.* in *December*, 1828, and he was, to a certain extent, the agent of the present defendants also.

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Then comes the second question, whether the plaintiffs have any right to recover the wool from the defendants in this action; upon the ground of fraud. It has been very forcibly urged on the part of the defendants, that it would be highly dangerous to lay down a rule, that, where a person purchases articles, which at the time he knows he will not be able to pay for, though those goods may have afterwards passed through other hands in the fair way of purchase, the original seller shall have a right to recover them, in whose hands soever they may be found. I fully agree in the truth of that proposition, but I think it cannot apply to the fraud which has been established in this case. The ground set up by the plaintiffs was, that there was an acting and an appearance of purchase given to the transfer of the wool from *Wallington & Co.* to the defendants, which in truth it did not really possess. Whether *Dunn*, as the agent of *Wallington & Co.*, went into the market and got the wool into his possession by the transfer from the plaintiffs under such a representation as might amount to the procuring or obtaining goods under false pretences, it is not necessary for me now to say; but it certainly approaches very nearly to that case. He obtained them under circumstances that place him and *Wallington & Co.* in the light of conspirators to procure possession of the wool. It is necessary to consider how the case stands upon the evidence and facts proved at the trial. So early as the month of *December*, 1828, the plaintiffs gave evidence of the mode by which Messrs. *Wallington & Co.* were keeping up their credit, by repeated and perpetual purchases, and forced sales at a ruinous discount. We then come to *August*, 1829, when the present defendants

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being aware that *Wallington & Co.* were in embarrassed circumstances, requested *Dunn*, as they fairly might do, and who for that purpose was their agent, to procure for them, by way of security, a consignment of wools from *Wallington & Co.*, to meet their renewed bills, without making any fresh advances. This being the state of things as to *Dunn's* knowledge of the mode in which *Wallington & Co.* were transacting their affairs, and also the existence of their immediate pressing embarrassments, and the defendants being also aware of the bills they had to renew, it is not too much to say that *Wallington & Co.* went to market with the probability, if not the certainty, that the wool would never be paid for; they thought fit to go through the mere formal ceremony of a bought and sold note, not with the view or design of handing over the wool to the purchaser, but to pass it to the credit of the defendants. It therefore appears to me not to be too much to say, that this was a fraud upon the rights of the plaintiffs as the sellers of the wool. At all events, it was left to a Jury of merchants to say, whether it was probable that the wool would ever be paid for; and, although the Jury have acquitted the defendants of fraud, yet they involve them in the legal consequences, as it was a fraud committed by their agent with a view to benefit them. On the whole, therefore, I, for one, am not disposed to dispute the verdict for the plaintiffs. If, however the plaintiffs had relied upon the naked fact of fraud, and offered no further evidence, it would be of no avail, for the mere proof of the contract would have proved no more than could be collected upon the face of it, nor would it have been evidence that the contract had been carried into effect. But the plaintiffs did not stop there, they called as a witness a person of the name of *Duthoit*, a clerk to *Wallington & Co.*; and he proved, from entries in their books, that the contracts written by *Dunn* were not merely formal bought and sold notes, but were in several instances real contracts, by which there had been large quantities of wool bought on the one

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side, and sold on the other, at a considerable discount, if not at a loss which no persons in trade would have consented to, unless they had been in embarrassed circumstances. But it has been said, that the evidence of the contracts made by *Dunn* was not admissible; but, as I have before observed, it was admissible as one of the steps in the cause by which the plaintiffs might shew how the property passed from them to *Wallington & Co.* If *Dunn*, instead of going through the form of a negotiation for a purchase by a bought and sold note, had gone to the plaintiffs' warehouse and taken the wool, it might have been proved that it was taken through the trespass of *Dunn*. If, instead of that, *Dunn* had stolen the wool, the act of stealing might have been shewn without calling *Dunn*, for he would not have been compelled to criminate himself. Again, if *Dunn* had not obtained the wool by either of these means, but by a fictitious purchase, *viz.* by putting forth a person who was apparently the real purchaser, but who did not mean to keep the wool, but to hand it over to the present defendants *instantly*; the plaintiffs as sellers might prove this last method of acquiring the property by fraud on the part of *Dunn*, without calling him as a witness. This, therefore, being only the first step in the cause, and the other parts being made out, which I think they were, I see no objection to the plaintiffs' proving this first or preliminary step, by shewing that the contract was entered into by *Dunn*, the agent, and that it was in his hand-writing. If, instead of its being a mere bought and sold note, it had been a bargain and sale of personalty, goods, or chattels, under seal, with a subscribing witness, it is quite clear that *Dunn* need not have been called. If he had been, his testimony would have been objected to, as the subscribing witness would be the proper person to prove the execution of the contract. This, therefore, being only the first step in the cause, the plaintiffs might avail themselves of it by adding subsequent evidence to shew that the contract had

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been acted upon; and I think that the subsequent evidence they offered to the Jury was sufficient to warrant the learned Judge who presided at the trial in receiving the contract in evidence, although it might not have been admissible *per se*, and unsupported by other proof.

Mr. Justice PARK.—Agreeing entirely as I do with the opinion expressed by my Lord Chief Justice, I did not intend to add one word; but I wish to refer to *Noble v. Adams*, in order to correct an error into which the defendants' counsel has fallen, from an inadvertent perusal of that case; and I am the more anxious to do so, because I am the only Judge in this Court who was present in 1816, when the judgment was pronounced, and in which I certainly concurred. I do not wish or intend to narrow the rule stated by text-writers, *viz.* that, where a person obtains goods under false pretences under the colour of purchase, the property is not changed; yet, in *Noble v. Adams*, Lord Chief Justice Gibbs laid down no such restriction, neither did the Court think that nothing short of obtaining goods under false pretences would vacate a bargain. There, the plaintiff, being in danger of insolvency, obtained goods, which he paid for by a bill of exchange drawn on a house which he knew to be insolvent; "and" said Lord Chief Justice Gibbs (a), "it was proved that the plaintiff knew that *Outhwaite's* bill was worth nothing, and that he considered his own credit in *England* as nearly gone; that he went to *Glasgow*, intending to purchase goods there from persons unacquainted with his credit or with the character of the bills." What the precise circumstances were, does not clearly appear in the case, except that the plaintiff meant to impose upon the sellers of the goods at *Glasgow*. "But," continued his Lordship, "by what means he prevailed on *Cross & Co.* to sell him the goods is not in proof; and unless his representations amounted to the offence of obtaining

(a) 2 Marsh. 370.

goods under false pretences, we cannot take upon ourselves to say, that the contract was altogether void; that is to say, with reference to the particular case before the Court; for, if what his Lordship had said in the outset of his judgment had been attended to, it is quite clear that he intended to guard himself against the conclusion which has been drawn from the particular expressions he then used; for he commenced his judgment by saying, that "the Court is of opinion that there ought to be a new trial in this case; because, without defining exactly what may or may not amount to such a fraud as would render the sale in question absolutely void, we are of opinion that the evidence, as it stands, does not shew any conduct on the part of the plaintiff, sufficient to convince us that the transaction was void." He, therefore, expressly guarded himself against that conclusion, leaving the question open to the particular circumstances of each particular case. Now, being of opinion that the obtaining goods under false pretences is not the only ground upon which a sale is rendered void, it becomes unnecessary to say that this case approaches very near it. I therefore think, on the whole, that the case was very properly left to the Jury, and the evidence rightly admitted, and I see no ground for setting aside the verdict for the plaintiffs.

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Mr. Justice GASELER.—It does not necessarily follow that the plaintiffs might have maintained this action against a *bona fide* purchaser without notice; but the ground upon which it is maintainable against the defendants is, that they had constituted *Dunn* their agent, for the purpose of covering or securing themselves, by getting a consignment of wools from *Wallington & Co.*; and *Dunn*, as their agent, having thought fit to procure that consignment by means of what the Jury have found to be a fraud, however innocently the defendants may have acted, they must suffer for *Dunn*, who acted as their agent at the time.

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Mr. Justice ALDERSON.—I am of the same opinion. The first question in this case is, whether there was a fraud committed by *Dunn* and *Wallington & Co.* upon the plaintiffs in the transaction between *Dunn* and them in the purchase of the wool, that is, such a fraud as to prevent the wool's passing out of the plaintiffs, or to divest them of their property in it. From the whole of the evidence, every act of *Dunn* and *Wallington & Co.* is directly in point to shew that a fraud was committed by them; for the plaintiffs proved the course of dealing pursued by *Dunn* and Messrs. *Wallington & Co.* with respect to other transactions; from which it might be fairly inferred, that they had committed such a fraud on obtaining the wool from the plaintiffs, as would vitiate the contract made by *Dunn* in respect of it. With that view, the evidence objected to was clearly admissible; and it seems to me, that a confusion has arisen, by treating this as a case of principal and agent, because, for the purposes of this particular transaction, *Dunn* and *Wallington & Co.* are all principals in the fraud, and their acts are evidence against themselves. It further appears to me that this might very well be put upon the ground of a conspiracy between *Wallington & Co.* and *Dunn*, to obtain goods from other persons; and I am not prepared to say that they might not have been indicted for a conspiracy, and perhaps convicted. But it is not necessary to give any opinion upon that point. If the wool was obtained by means of such conspiracy, then no right of property passed out of the plaintiffs; and they have a right to maintain this action against the defendants, they being the parties in whose hands the wool was found. The only remaining question is, whether the case of *Parker v. Patrick* is a decision to authorize the defendants to retain the possession of the wool. There appears to me to be this material distinction between that case and the present, *viz.* that here the transaction was carried on by

the misconduct of their own agent; and I therefore concur with the Court in thinking that there is no ground to disturb the verdict for the plaintiffs. The rule for setting it aside must consequently be—

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Discharged.

COSTER and Another, Executors of SUSANNAH BROWN, deceased, v. COWLING.

Friday,
May 6th.

THIS was an action of covenant for not repairing a house and premises demised by the testatrix, *Susannah Brown*, to the defendant.

At the trial, before Lord Chief Justice *Tindal*, at *Guildhall*, at the sittings after the last Term, on the production of the lease by the plaintiffs, it appeared, that the testatrix demised to the defendant a certain house, with the lands thereto adjoining, called *Bedford-house*, for the term of fifty years, if the testatrix should so long live, at the yearly rent of 370*l.*; and, by a separate *reddendum*, 50*l. per annum* were reserved for the use of the furniture and fixtures; and the defendant covenanted to pay the testatrix the said yearly reserved *rents*. The lease was stamped with a 3*l.* stamp: upon which it was objected for the defendant, that it could not be read in evidence, as the stamp ought at least to have been 4*l.*, as the sums reserved for the house, lands, furniture, and fixtures, exceeded 400*l. per annum*. His Lordship being of opinion that the objection was well founded, a verdict was taken for the plaintiffs with nominal damages, leave being reserved to the defendant to move to set it aside, and enter a nonsuit, in case the Court should be of opinion that the lease was not properly stamped.

Where a house and lands were demised by lease for a term of years, at the yearly rent of 370*l.*, and there was a separate reservation of 50*l. per annum* for the use of the furniture and fixtures:—*Held*, that under the statute 55 *Geo.* 3, c. 184, Sched. Part 1, tit. "Lease," the instrument required a 4*l.* stamp, such being the *ad valorem* duty on the aggregate amount of the rents reserved; as the furniture and fixtures were accessory to the house and lands.

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Mr. Serjeant *Wilde*, on a former day in this Term, accordingly obtained a rule *nisi*. He referred to the statute 55 Geo. 3, c. 184 (a), which requires, that on a lease or tack of any lands, hereditaments, or heritable subjects, at a yearly rent, without any sum of money by way of fine, premium, or *grassum* paid for the same, where the yearly rent shall amount to 400*l.* and not to 600*l.*, a duty of 4*l.* shall be paid; and on a lease or tack of any kind, not otherwise charged in the schedule, a duty of 1*l.* 15*s.* is chargeable. Whatever, therefore, is granted for a specified and definite term, at a yearly rent, is made the subject of a stamp duty; and, as the lease in question embraced the house, land, furniture, and fixtures, which were demised together, it fell within the *ad valorem* duty, and required a stamp of 4*l.*; or, if the furniture and fixtures can be considered as a separate demise, the additional stamp of 1*l.* 15*s.* should have been paid.

It was also moved, in arrest of judgment, that the declaration was insufficient, as the plaintiffs had not alleged that the testatrix had *been damnified in her life-time*, it being only averred, generally, that the defendant suffered the house and premises to be and continue ruinous and prostrate, contrary to the form and effect of the indenture. But, as the Court gave no opinion upon that point, it is unnecessary to refer to the authorities which were cited in support of the objection.

Mr. Serjeant *Taddy* and Mr. Serjeant *Andrews* now shewed cause. The proper stamp was impressed on the lease. If, indeed, the 50*l.* for the furniture and fixtures had been reserved or made payable at a different time, or by a separate instrument, the additional stamp of 1*l.* 15*s.* might have been necessary. The *ad valorem* duty is only chargeable on lands, hereditaments, or heritable subjects, and

(a) Schedule, Part I., tit. *Lease*.

this was in substance a lease of a house and lands. The furniture and fixtures were merely accessory or appurtenant to the enjoyment of the house. The word "hereditaments" in the schedule of the act must be taken to refer to the same subject-matter as those immediately preceding it, namely, a lease of lands; and "heritable subjects" can apply only to property in *Scotland*. Besides, the furniture and fixtures were not the principal object of the demise; and as the house and lands were let at the same time, it constitutes one and the same transaction. The rent reserved for the use of the furniture can only apply to chattels, which were never intended to be made chargeable to the stamp duties imposed by the statute; and although a lease not otherwise charged in the schedule is made liable to a duty of 1*l.* 15*s.*, yet such lease can only apply to lands and hereditaments, which cannot be referrible to furniture and fixtures; and here the subject-matter of the lease was the demise of the house and lands, and for which the proper stamp was paid.

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Lord Chief Justice TINDAL.—It appears to me, that the plaintiffs are in this dilemma: the sum of 50*l.* reserved for the furniture and fixtures is either in the nature of an increased rent, and accessory to the house and land, or it is a distinct and separate rent. A person might let a room in a factory for 20*l.* a-year, but if he demised it together with the machinery it might contain, he might require 500*l.* If, then, the furniture and fixtures be accessory to the house, the rent reserved for them should have been added to the principal sum; and as both would have exceeded the yearly rent of 400*l.*, the lease should have been stamped with a 4*l.* stamp. But if the sum of 50*l.* reserved for the furniture and fixtures is a distinct and separate rent, then it falls within the description of "a lease *not otherwise charged in the schedule*," which relates to a different subject-matter from a lease of lands at a yearly

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rent, where the *ad valorem* duty is payable. Therefore, *quâcunque vid dala*, the lease in question was not properly stamped.

Mr. Justice PARK.—The words of the schedule apply to and include *Scotch* as well as *English* leases; and “heritable subjects” refer to chattels real. So the word “hereditaments” may be taken to apply to similar property in this country. But the shedule includes a proviso for leases of any kind not otherwise charged in the schedule. The rent reserved for the furniture and fixtures should, therefore, either have been conjoined with, or added to the rent reserved for the house and land, as being accessory to it; or it should have been treated as a separate demise, and the instrument stamped with a 1*l.* 15*s.* stamp accordingly.

Mr. Justice GASELER concurred.

Mr. Justice ALDERSON.—As the house and furniture were demised at the same time, and by the same instrument, I much doubt whether the additional stamp of 1*l.* 15*s.* was necessary. But the lease should have been stamped with a 4*l.* stamp, as the aggregate amount of the two sums reserved exceeded 400*l.* *per annum*. In *Boase v. Jackson* (a) the plaintiff demised a slate pit at *G.*, and stone quarries at *M.*, to the defendant, under an indenture of lease, to hold the one from *Lady-day*, 1815, and the other, from *Michaelmas*, 1817, for the several terms of fourteen years from the respective dates thereof, at the yearly rent of 70*l.* for the slate pit, and 150*l.* for the quarries; and it was held, that all the premises might be demised by one indenture of lease, and that one *ad valorem* stamp on the aggregate amount was sufficient, as the letting must be considered as one transaction. So here, the house and land, furniture and fixtures, were demised by the same instru-

(a) 6 J. B. Moore, 480; S. C. 3 Brod. & Bing. 185.

ment, on which the *ad valorem* stamp on the aggregate amount ought to have been impressed. The rule for entering a nonsuit must therefore be made—

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Absolute (a).

(a) When cause was shewn *Taddy* stated that the lease had against the rule, Mr. Serjeant been stamped with a 4*l.* stamp.

DUVERGIER v. FELLOWES.

Monday,
May 9th.

IN the last *Michaelmas* Term, *vis.* on the 25th November, a rule was obtained by Mr. Serjeant *Wilde*, calling upon the defendant to shew cause why the recognizance of bail in error in this cause should not be discharged, it having been entered into unnecessarily, and by mistake. The application was founded on an affidavit of the attorney for the bail in error, who stated, that an action was brought in this Court by the plaintiff, on a joint and several bond, executed by the defendant and two others, conditioned for payment to the plaintiff of the sum of 10,000*l.* That issue was joined in such action in *Easter* Term, 1828; that several issues were taken upon the facts, and that there was a demurrer in law to one of the defendant's pleas. That the demurrer was argued, and judgment given for the defendant, in *Michaelmas* Term, 1828 (a). That a writ of error was brought by the plaintiff on this judgment, in the Court of *King's Bench*, in *Hilary* Term, 1829, when bail in error were put in for him, who entered into a recognizance, with a condition that the plaintiff should prosecute his writ of error with effect. That that writ of error was argued in the Court of *King's Bench*, in *Easter* Term last, when the judgment

A person who is plaintiff both below and above, need not give bail in error. Where, therefore, upon demurrer to a plea, judgment was given in this Court for the defendant below, and the plaintiff brought a writ of error in the Court of *King's Bench*, and the judgment of this Court was affirmed; after which he brought a writ of error to the House of Lords, upon which a recognizance of bail in error was entered into—The Court ordered it to be cancelled, on an application by the bail, although it was sworn that the plaintiff was a foreigner and insolvent.

(a) See 2 Moore & Payne, 384.

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of this Court was affirmed. That a writ of error upon that judgment of affirmance was afterwards brought from the Court of *King's Bench* to the House of Lords, and which is now pending. That upon the bringing of the last-mentioned writ of error, bail in error were put in by the plaintiff in the Court of *King's Bench*, with a similar condition to that entered into in this Court. That the clerk of the plaintiff's attorney, who caused bail in error to be put in, was dead; and that, on that mistake being discovered, an application was made to the Court of *King's Bench* to discharge the recognizance; and that, on cause being shewn in the last *Michaelmas* Term, the rule for discharging the recognizance was made absolute, on payment of costs.

The learned Serjeant relied on the case of *Freeman v. Garden* (a), where, a plaintiff in error being also the plaintiff below, it was held, that he was not required to give bail in error; and Lord Chief Justice *Abbott* said—"It is quite manifest, from the language of the statute 3 *Jac.* 1, c. 8, that the case of a defendant below becoming plaintiff above in a writ of error, is the only case contemplated in which bail is required. A person who is plaintiff both below and above need not give bail in error."

Mr. Serjeant *Taddy*, on a former day in this term, shewed cause.—Admitting that the first section of the statute 6 *Geo.* 4, c. 96, which was passed for preventing the delays occasioned to creditors by frivolous writs of error, only requires bail in error to be put in after judgment *for the plaintiff*, and that the case of *Freeman v. Garden* is an authority to shew, that a person who is plaintiff both below and above need not give bail in error; yet the application in this case should have been made earlier, as no motion was made to discharge the recognizance until

(a) 1 Dow. & Ryl. 184.

after the judgment of this Court had been affirmed in the Court of *King's Bench*, and a fresh writ of error brought in the House of Lords. The learned Serjeant produced an affidavit, which stated that the plaintiff is a foreigner, and out of the jurisdiction of this Court, and that it was believed that he is in insolvent circumstances. It was therefore submitted, that, at all events, he ought to be compelled to give security for costs.

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Mr. Serjeant *Wilde*, in support of his rule, intimated, that as the application to cancel the recognizance, which was altogether unnecessary, was made on behalf of the bail, they ought not to be burthened with the payment of costs. That this case was distinguishable from that before the Court of *King's Bench*, when they ordered the recognizance to be cancelled on payment of costs, as there the application was made on behalf of the plaintiff himself.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court, as follows:—

This was a rule calling upon the defendant to shew cause why the recognizance of bail in error in this cause should not be cancelled. The facts of the case are these:—In the year 1828, an action was brought in this Court by the plaintiff in error against the defendant in error, on a bond; in which action the defendant pleaded several pleas; on some of which issues were joined, and one was demurred to. The demurrer having been argued, judgment was given for the defendant in *Michaelmas Term*, 1828. A writ of error having been brought on the judgment, the recognizance of bail now sought to be cancelled was entered into, conditioned to prosecute the writ of error with effect. That writ of error was argued in the Court of *King's Bench*, in *Easter Term* last, when the judgment

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of this Court was affirmed. A writ of error upon that judgment of affirmance was afterwards brought, which is now depending in the House of Lords. Upon the suing out of that writ of error, a recognizance of bail having been entered into, similar to that entered into in this Court, an application to cancel that recognizance was made to the Court of *King's Bench*, when a rule *nisi* was granted, which, in *Michaelmas* Term last, was made absolute, on payment of costs, on the authority of the case of *Freeman v. Garden* (a), in which it was held, that the statute 3 Jac. 1, c. 8, requiring the recognizance to be in double the sum recovered, extended only to cases in which the writ of error was brought *by the defendant* in the Court below. The present application was afterwards made to this Court; and, on shewing cause against it, the authority of the case in *Dowling and Ryland* was not disputed, nor the propriety of the decision of the Court of *King's Bench* between these parties; but it was insisted, that the present application came too late, the parties having laid by until after the judgment was affirmed, and a new writ of error brought. We think, however, this circumstance makes no difference, inasmuch as there being no authority to compel the entering into such recognizance, it seems to us it cannot possibly be enforced. Another objection made to the application is, that the plaintiff is insolvent, and a foreigner, and resident out of the jurisdiction of the Court; and that the action was brought, not for his benefit, but of a creditor, whom he had permitted to use his name—all which appears by affidavit; and that the Court would, under the circumstances, have compelled the giving security for costs. To this we answer, that a special application for that purpose should have been made pending the suit, and that the Court cannot, at this period of the cause, take any notice of these circumstances. We are there-

(a) 1 Dow. & Ryl. 184.

fore of opinion, that, nevertheless, the rule should be made absolute.

On the part of the bail, it is contended, that, under the circumstances stated in the affidavit, it should be made absolute without costs; but we see no reason to make any distinction between this case and the rule pronounced by the Court of *King's Bench*. This rule must, therefore, be made—

Absolute, upon payment of costs.

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DALGLEISH and four Others v. HODGSON.

Monday,
May 9th.

THIS was an action on a policy of insurance on goods, valued at 2,300*l.*, on board the ship *George*, insured upon a voyage from *Liverpool* to *Buenos Ayres*, and any port or ports in the *River Plate*; and in the event of a blockade, or being ordered off the *River Plate*, with liberty to proceed to any other port in *South America*, not round *Cape Horn*; with leave to discharge there, or wait for information, and return to *Buenos Ayres*.

The defendant subscribed the policy for 300*l.* The declaration was in the usual form; and the loss was averred in the first count to be by seizure and confiscation by mariners belonging to a ship of war, in the service of the Emperor of *Brazil*. In the second, by seizure and detention of persons unknown. In the third, by hostile capture by mariners belonging to a ship of war, in the service of the Emperor of *Brazil*. And, in the fourth count, the loss was averred to be by the barratry of the master.

The sentence of a foreign Court of Admiralty, condemning a vessel for attempting to violate a blockade, is not conclusive, unless the fact upon which the condemnation proceeded appears upon the face of the sentence, free from doubt and ambiguity; it cannot be collected by mere inference, nor can it be left in uncertainty whether the vessel was condemned upon one ground, which would be a just ground of condemnation by the law of nations, or on

another ground, which would only amount to a breach of the municipal regulations of the condemning country. A ship was destined to a port which was notified to be under blockade:—*Held*, that the voyage was not illegal in its inception, as the vessel might have sailed for the purpose of inquiring whether the blockade existed.

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The defendant pleaded the general issue. The cause came on for trial before Lord Chief Justice *Tindal*, at *Guildhall*, at the sittings after *Michaelmas* Term, 1829; when his Lordship directed a verdict to be entered for the plaintiffs, damages 300*l.*, subject to a case to be stated for the opinion of this Court, upon the facts admitted and given in evidence on the trial, which were as follow:—

The goods insured were laden on board the *George*, whereof *Robert Hunter* was master, previously to the sailing of the vessel on the voyage insured; and the plaintiffs were interested as averred in the declaration. On the 2nd *August*, 1826, the *George* sailed from *Liverpool*, bound to *Buenos Ayres*; on the 18th *February*, 1826, the following notification appeared in the *London Gazette* of that day:—

“ It has been notified, by the *Brazilian* Minister for Foreign Affairs, to his Majesty’s *charge d’affaires* at *Rio de Janeiro*, by communication dated the 7th *December* last, that the Emperor of *Brazil* had ordered to be instituted a strict blockade of the ports in the *River Plate*, belonging to the government of *Buenos Ayres*.”

The following instructions were given by the owners of the said vessel to the master, previously to his sailing on the voyage in question, *viz.*—“ Your object, in the first place, is, to reach *Buenos Ayres*; but, should you be warned off by an intimation from the *Brazilian* cruisers of the existence of the blockade, you will then proceed to *Monte Video*, and land your cargo under the orders of Messrs. *Anderson & Co.*’s agent there. Messrs. *Anderson* will provide you with other instructions, which you will endeavour to comply with, to the best of your power, in all points which are not in contravention of the agreement or your bills of lading, or in opposition to your owners’ interests.

“ You will scrupulously guard against performing any

act which can be construed into a violation of the laws of the blockade, such as may render you exposed to injurious delay or detention.

“ In case you terminate your voyage at *Monte Video*, you will please to consider yourself authorized to enter on any new freight or charter, which will prove a remunerating price to the vessel; but if you can previously consult with Messrs. *J. P. Robertson & Co.* in *Buenos Ayres*, we wish you to do it, if no prejudice to the owners shall arise in consequence of the delay. Insurance is done on the vessel on 5000*l.* from *Liverpool* to a port of discharge in the *River Plate*; and, on your arrival there, you will give us timely notice to regulate our insurance on your further voyage.”

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On the 6th *October*, 1826, about six o'clock *P. M.*, the vessel arrived abreast of the port of *Monte Video*, two leagues distant. The wind blowing from the port, and the master not meeting with any ship of war, or any other vessel from which he could obtain any intelligence respecting the state of the port of *Buenos Ayres*, he continued his voyage, and proceeded further up the *River Plate*, in pursuance of his instructions, conceiving that the blockade of *Buenos Ayres* no longer existed, until he had got somewhat beyond the point of *Lara*, about ten o'clock *P. M.* on the night of the 7th of *October*, when he descried the *Brasilian* squadron, and immediately let go his anchor in sight of the squadron. While the ship was at anchor, an officer belonging to the *Brasilian* corvette of war *Ymparica*, came on board the *George*, and took away the ship's register, log book, and the instructions relative to the voyage, together with other papers relating to the ship and cargo. The master was at the same time conveyed on board the commodore's frigate *Nitroy*, and one half of the crew sent on board the corvette *Ymparica*. The master was detained on board the frigate until the 11th, on which

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day the *George*, with the goods on board, was carried into *Monte Video* as a prize by the *Brazilian* squadron. Half the crew of the *George* were detained by the squadron as prisoners of war. The *George* drew sixteen feet of water. The depth of water in the River *Plate*, off *Buenos Ayres*, was not sufficient to have enabled the *George* to get into the harbour of *Buenos Ayres*; but she might have lain in the outer roads, where the cargoes of deeply laden vessels, bound to *Buenos Ayres*, are usually discharged into lighters. Such outer roads were within the reach of the blockading squadron, and not protected by the fort or batteries of *Buenos Ayres*. After the *George* and the goods were taken into *Monte Video*, proceedings were commenced in the prize Court there; and on the 13th *December*, 1826, the following sentence was pronounced by the Judge of that Court.

“ In virtue of summary process against the *English* brig *George*, taken by the van-guard of the imperial squadron, now blockading the enemy's port in the River *Plate*, it plainly appears, from all the documents brought forward in the said process, that the said brig sailed from *Liverpool*, knowing of the said blockade, and which the captured do not even deny. Neither that her destination was *Buenos Ayres*, from which port, at only a short distance, she was taken; and for this reason it is evident she ought to be considered as violating the said blockade; and which she would have effected, but for the diligence of the capturers, in spite of all the means tried to evade it. Neither were the endeavours used by the captured to get a part of the cargo of this prize into *Buenos Ayres* less notorious; but which having not been able to accomplish in other vessels, and the same being returned to *England*, they were in hopes to do in this; and this with all diligence, as is proved by the official report, fol. 57, and as is clear by the evasions the captain had recourse to in his answers to the interrogatories, and the salutary clause shewn in the trans-

lated letter, folios 44 and 65. Forasmuch, as besides not doing away the proof that *Buenos Ayres* was the first port the shipment was destined for, (in itself criminal), it also happened, that the captured have not even the plausible excuse of coming to this port of *Monte Video*, first, to get intelligence, and thereby comply with the published instructions. On the contrary, it is proved by the log book, translated fol. 68, that they saw it, and passed even much beyond it, and where they were captured.

“ From all which, and from what the documents state, I judge the said brig *George*, and her cargo, to be good and lawful prize to the capturers. The captured paying the expenses. This process to be remitted to the supreme council of justice.

Monte Video, 13th December, 1826.

Don Louis Joze Fernandez de Oliverrei.”

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The plaintiffs called several witnesses, the first of whom proved that he was the agent for one of the owners of the *George*; that she was a new ship, and that the voyage in question was her first voyage; that she cost 7500*l.* and was insured for 5000*l.*; and that the freight agreed to be paid to the owners was the ordinary freight on a voyage to the *River Plate*, and amounted to the sum of 800*l.* The second witness proved, that the blockade of *Buenos Ayres* ceased on the 1st October, 1828; and on his being asked whether the *George*, on arriving abreast of the port of *Monte Video*, two leagues distant, the wind blowing from the port, could have gone in to make inquiry, he answered—“ It would have occasioned great delay.” The witness also said, that he supposed, from the appearance of the *George*, that she must have been a fast sailer; and he thought she might have had a great chance of escaping, if, instead of dropping her anchor, she had tacked and run down. The witness further stated, that he was at *Buenos Ayres* on the 1st October, 1828; that there was nothing dangerous in going into *Monte Video*; but that, if the wind was blowing

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strong from the North, that is, from the port, the delay might have been very great; and he thought she could not have gone into *Monte Video*. And, upon his cross-examination he stated, that, if he had attempted to break the blockade, his conduct would have been to try to escape, and that he should immediately have tacked and stood away.

The plaintiffs' last witness admitted, on cross-examination, that he had searched the *London Gazette*, for a notification of the raising of the blockade of *Buenos Ayres*, but that he did not find any, and did not go to the council office to make the inquiry.

The question for the opinion of the Court was, whether the plaintiffs were, or were not entitled to recover. If the Court should be of opinion that the plaintiffs were entitled to recover, the verdict for 300*l.* was to stand; but if the Court should be of opinion that the plaintiffs were not entitled to recover, then a nonsuit was to be entered; and it was agreed that the Court was to be at liberty to form the same inferences from the evidence as the Jury might have done.

The case came on for argument on a former day in this term.

Mr. Serjeant *Spankie*, for the plaintiffs.—*First*, the captain of the ship *George* was guilty of no breach of duty, as the vessel was in the due prosecution of a legal voyage at the time of the seizure by the *Brazilian* squadron. *Secondly*, the sentence pronounced by the Judge of the Prize Court at *Monte Video*, as set out in the case, is not conclusive to shew that the ship was condemned for attempting to break the blockade of *Buenos Ayres*. Although nations at war with each other have certain rights as between themselves, and the *Brazilian* Government might order a blockade to be instituted of the ports in the river *Plate*; and though, generally speaking, it is the duty of neutrals not

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to violate the lawful rights of a belligerent power, which has directed a blockade to be made, yet it is necessary to consider how far a mere notice of a blockade is to operate; and the question here is, whether, at the time the vessel sailed, there was an intention to violate the blockade, so as to render her liable to seizure or capture at all events. Although, in the case of the *Neptunus*, Sir *William Scott* (now Lord *Stowell*) said (a)—“That he should hold, that a neutral master can never be heard to aver against a notification of blockade, that he is ignorant of it; and that, in the case of a notified blockade, it is to be presumed that the notification will be formally revoked, and that due notice will be given of it; and that, till that is done, the port is to be considered as closed up, and, from the moment of quitting port to sail on such a destination, the offence of violating the blockade is complete, and the property engaged in it subject to confiscation;” yet, in the subsequent case of the *Shepherdess* (b), that general doctrine was qualified and modified. There, an *American* ship and cargo were taken on a voyage from *America* to the port of *Havre*, in violation of the blockade of that port; and Sir *William Scott* said (c)—“It must be inferred, and indeed admitted, that the notification of the blockade of *Havre* had been received in *America*. To all the general rules of observance of a blockade duly imposed, the subjects of *America* are undoubtedly bound equally with those of other countries. At the same time, looking to the great distance at which they are placed, and being unwilling to press, with any degree of hardship, on the fair convenience of commerce, the Court has held, even where the blockade of a port in *Europe* has been notified in *America*, that the merchants of that country might still clear out conditionally for the blockaded port, on the supposition, that, before the arrival of the vessel, a relaxa-

(a) 2 Rob. Adm. Rep. 113, 114. (b) 5 Rob. Adm. Rep. 262.

(c) Ib. 263.

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tion might have taken place." It therefore follows, that if a neutral vessel sail from a port at a great distance from the blockading power, and with no intention to violate the blockade, she is not liable to seizure; and here, as the plaintiffs might fairly presume that the blockade would have ceased before the vessel could reach *Buenos Ayres*, it was a fair commercial adventure, and not a breach of the rights of the belligerent power. It is quite clear that the present voyage was not illegal in its inception; for in *Naylor v. Taylor* (a), in an action on a policy on goods at and from *Liverpool*, to any port or place in the river *Plate*, with liberty, in the event of a blockade, or being ordered off the river *Plate*, to proceed to any other port, and there wait or discharge, and the ship sailed after the notification of the blockade; it was contended, that the voyage being to a blockaded port, after notification of the blockade, was illegal. Lord *Tenterden*, in delivering the judgment of the Court, after time taken for consideration, said (b)—“ We think there is no ground for saying, that this voyage, as insured, was illegal in its commencement; indeed, according to the opinion of Lord *Stowell*, in the case of the *Shepherdess*, the vessel might have sailed for *Buenos Ayres* without contravening the law of nations, provided it was a part of the original intention to inquire as to the continuance of the blockade at some port of the blockading country; and in this case inquiry might have been made at *Monte Video*, or of any of the *Brazilian* ships met in the river *Plate*; and the policy is framed upon a doubt whether the blockade would continue at the time of the ship's arrival in the *Plate*, and does not indicate any intention to violate the blockade.” The instructions given by the owners of the vessel to the master, stated, that his object, in the first place, was to reach *Buenos Ayres*; but that, should he be warned off by an intimation from the *Brazilian* cruisers of the existence of the blockade, he was then to proceed to *Monte*

(a) 9 Barn. & Cress. 718; S. C.
 4 Man. & Ryl. 526.

(b) 9 Barn. & Cress. 723; S. C.
 4 Man. & Ryl. 531.

Video, and he was scrupulously to guard against performing any act which could be construed into a violation of the laws of the blockade. The commencement of the voyage, as well as the instructions, were good *sub modo*, and there was no intention by the owners to violate or affect the rights of the belligerent party; and it is found as a fact, that the wind was adverse to the master's making any inquiry at *Monte Video*; neither did he meet with any vessel from which he could obtain any intelligence as to the state of the port of *Buenos Ayres*; and as soon as the *Brazilian* squadron appeared in sight, instead of endeavouring to escape, as he would have done if he had intended to violate the blockade, he immediately let go his anchor; and, by his giving up the log-book and the instructions, together with all the ship's papers, it shews that he was guilty of no concealment; nor can barratry be imputed to him; and, as he acted in strict conformity with his instructions, in endeavouring to guard against a violation of the blockade, he was in the fair and legal prosecution of the voyage at the time of the seizure.

Secondly—The sentence of condemnation by the Judge of the Prize Court at *Monte Video* is not conclusive of the fact, that the ship was seized for attempting to violate the blockade, and, therefore, it cannot avail the defendant. In Mr. Justice *Park's* Treatise on the Law of Insurance, where all the cases on this subject are collected, it is said (a)—“A sentence of a foreign Court of Admiralty binds all the world as to every thing contained within it; but, where the cause of condemnation does not appear to be on the specific ground material to the point in issue, evidence must be admitted in order to explain it.” The principle deducible from all the authorities is, that the sentence is conclusive evidence of the points upon which it professes to decide, but where it professes to be made on particu-

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(a) 6th Edit. 464.

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lar grounds, which are set forth in the sentence, but which appear not to warrant the condemnation, the sentence will not be conclusive as to such facts. So, where the ground of condemnation is left in doubt or ambiguity, or is only to be collected by inference, the sentence is only evidence of the existence of the condemnation, but not of the conclusion on which the condemnation is founded. In *Hughes v. Cornelius* (a), it was first established, that a sentence in a foreign Court of Admiralty, decreeing a ship to be a lawful prize, is conclusive as to the question of property. In *Bernardi v. Motteux* (b), where there was some ambiguity in the sentence, so that the precise ground of the determination could not be collected, the Court held that the condemnation was not conclusive evidence that the ship was not neutral, as it did not appear that the condemnation went upon that ground. In *Saloucci v. Woodmass* (c), as there was no special ground stated, and the ship was condemned generally as lawful prize, Lord Mansfield said—"It must be presumed from the condemnation, as no other cause appears, that the sentence proceeded on the ground of the property belonging to an enemy." In *Lothian v. Henderson* (d), the Court admitted in evidence the sentence of a foreign Court of Admiralty, in an action upon a policy, in order to falsify a warranty of neutrality; and it was held that such sentence was conclusive of the several matters it proposed *directly* to decide. In *Kindersley v. Chase* (e), where the sentence proceeded on the express ground of enemy's property, it was held to be conclusive that the property belonged to them. In *Pollard v. Bell*, Mr. Justice Le Blanc said (f)—"The conclusion to be drawn from all the authorities is, that the sentence of a foreign court is conclusive on that point that it professes to decide; but that if it profess to be made on particular grounds,

(a) 2 Show. 232.

(b) 2 Doug. 574.

(c) Park on Insur. 471.

(d) 3 Bos. & Pul. 499.

(e) Park on Insur. 486.

(f) 8 Term Rep. 444.

and they are set forth in the sentence, and appear not to warrant the condemnation, then the sentence is not conclusive as to those facts." That is the true principle. In *Bolton v. Gladstone*, Lord *Ellenborough* said (a)—“ That all sentences of foreign Courts of competent jurisdiction to decide questions of prize, are to be received here as conclusive evidence in actions upon policies, upon every subject immediately and properly within the jurisdiction of such foreign Courts, and upon which they have professed to decide judicially.” Still, however, they must decide upon the point distinctly; and that they intended to decide it, is not to be collected by inference or argument, but by specific affirmation. In *Calvert v. Bovill* (b), a sentence of a Court abroad was held not to be conclusive evidence against a warranty of neutrality, because the special grounds assigned for the sentence did not necessarily lead to such a conclusion. In *Fisher v. Ogle* (c), Lord *Ellenborough* held that the sentence of a foreign Court of Admiralty is evidence only of what it positively and specifically affirms in the adjudicative part of it,—not of what may be gathered from it by way of inference. “ For,” said his Lordship, “ it is by an overstrained comity that these sentences are received as conclusive evidence of the facts which they positively aver, and upon which they specifically profess to be founded.” In *Everth v. Hannam* (d), the sentence of condemnation stated that it clearly appeared that the captain had endeavoured to enter a port of *Norway* which was then under blockade;—and upon that ground the condemnation proceeded. Here, however, it is nowhere stated that the vessel was condemned for an attempt to break the blockade; and it may fairly be assumed, that the condemnation took place on a totally different ground; and, as the vessel was in the fair course of her voyage, and prosecuting it *bond fide* at the time of the

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(a) 5 East, 160.

(d) 2 Marsh. 72; S. C. 6 Taunt.

(b) 7 Term Rep. 523.

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(c) 1 Camp. 418.

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seizure, it is not to be presumed that the captain was guilty of barratry; neither was he guilty of a deviation, as, if the blockade had been raised, which he had fair grounds to suppose might have been the case, he would have acted according to his instructions, by sailing directly for *Buenos Ayres*.

Mr. Serjeant *Jones*, for the defendant.—*First*, The condemnation and proceedings in the Prize Court at *Monte Video* are conclusive, to shew that the ship was taken when proceeding on a voyage with an intent to violate the blockade at *Buenos Ayres*. *Secondly*, The same inference must be drawn from the whole of the evidence, which, coupled with the facts found in the case, shew a breach of the blockade, sufficient to avoid the policy; and, *lastly*, as the voyage was to *Buenos Ayres* if not blockaded, and the owners and the captain had notification of the blockade before the ship sailed, the voyage was illegal in its commencement. But, before the ship proceeded up the river *Plate*, the captain should have caused inquiry to be made at *Monte Video* as to the then state of the blockade, and therefore the ship, when taken so near to *Buenos Ayres*, was not on the voyage insured against by the policy. At all events, the captain was guilty of a deviation, as he did not call at *Monte Video*, according to his instructions.

First, It is quite clear, that, under the circumstances, there was a breach of the blockade; and the sentence is conclusive as to the grounds assigned for the condemnation of the vessel, which are apparent upon the face of the sentence, *viz.* the breach of the blockade. The result of all the authorities shews, that, where the Courts here can see the substantial grounds of the decision of a foreign Court of Admiralty, the grounds so assigned must be coupled with the fact of condemnation, and the sentence is conclusive evidence of all the points upon which it professes to decide. Although the conclusion to which the

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Court abroad has arrived, may be erroneous, yet the Courts here are bound to look at the facts upon which that Court proceeded, and the sentence is conclusive evidence of such facts. In *Lothian v. Henderson*, which is the leading case upon this subject, and which was decided after great deliberation, it was determined, not only that a sentence of a foreign Court of Admiralty is conclusive *in rem*, but that it is also conclusive of the several matters it proposed directly to decide; and here, that the condemnation was *in rem*, is apparent and manifest by the terms of the sentence. In *Hughes v. Cornelius*, the sentence was held to be conclusive to decide the question of property. In *Barsillay v. Lewis* (a), where it was evident that the sentence proceeded upon the ground of the property not being neutral, it was held to be conclusive evidence against the assured, that he had not complied with his warranty. In *Bernardi v. Motteux*, the cause of condemnation did not appear to be on the specific ground material to the point at issue; but, Lord Mansfield said—"As to whatever it meant to decide, we must take it to be conclusive." In *Calvert v. Bovill*, Mr. Justice Lawrence said (b)—"The cases alluded to in the argument seem to have established this, that, if we can collect from the sentence itself on what ground the foreign Court decided, that is conclusive in any action brought in this country; but, if it be ambiguous, or it does not appear on the face of the sentence on what ground they proceeded, then we may receive evidence to shew what were the grounds of the decision abroad." The question in this case then is, whether or not the Court can fairly and reasonably collect from the sentence of the Court at *Monte Video*, that the ground of the condemnation of the vessel was the breach of the blockade. The sentence commences by stating that the brig sailed from *Liverpool knowing of the blockade*, and which the captured did not deny, nor that her destination was *Buenos Ayres*; from which

(a) Park on Insur. 469.

(b) 7 Term Rep. 527.

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port, at only a short distance, she was taken; and that, "*for this reason*, it was evident she ought to be considered as violating the blockade, and which she would have effected, but for the diligence of the capturers, in spite of all the means tried to evade it." No other substantial ground of condemnation is assigned; and, if the Judge of the Prize Court had introduced the words "on this ground," instead of "*for this reason*," it would be conclusive to shew that the breach of the blockade was the ground of the condemnation. Although the sentence contains a narrative of other facts, it is immaterial, if the Court can collect the ground of the decision.—But, independently of that, the facts stated in the case are conclusive to shew that there was a breach of the blockade. There was not only a knowledge of its existence by the owners and the captain before the commencement of the voyage, but a notification *de facto*, previously to the sailing of the vessel; and it was expressly adverted to in the letter of instructions. Besides, although the instructions stated that the object in the first place was to reach *Buenos Ayres*, yet it was also stated, that if the captain should be warned off by an intimation from the *Brazilian* cruisers of the existence of the blockade, he was to proceed to *Monte Video*; and, as he did not meet with such cruisers, or any other vessel, from which he could obtain any intelligence as to the state of *Buenos Ayres*, he should have proceeded to *Monte Video* in the first instance, for the purpose of making such inquiries, particularly, as it was in the regular course of his voyage; and, as he did not do so, he was guilty of a deviation. In the case of the *Shepherdess*, Sir William Scott said, that, as to the line of caution to be observed by the captain, the Court has always expected that the inquiry should be made at some of the *British* ports in the Channel; that it could not be, that ships should be permitted to resort to the ports of the blockaded country for this information, since every one must perceive, that such a liberty would place it in the power of the enemy to determine the continu-

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ance of the blockade:" and here, the captain was only a short distance from the blockaded port when the vessel was taken. In the case of the *Neptunus*, Sir William Scott said—" In the case of a notified blockade, the act of sailing to a blockaded place is sufficient to constitute the offence of violating it." In the case of the *Spes* and the *Irene*, that learned Judge said (a)—" The neutral merchant is not to speculate on the greater or less probability of the termination of a blockade, to send his vessels to the very mouth of the river, and say, if you do not meet with the blockading force, enter—if you do, ask a warning, and proceed elsewhere. The true rule is, that, after the knowledge of an existing blockade, you are not to go to the very station of blockade, under pretence of inquiry. If particular parties are innocent in their intention, it is still a measure of necessary caution, and of preventive legal policy, to hold the rule general against the liberty of inquiring at the very mouth of the blockaded port, which would amount, in practice, to a universal license to attempt to enter, and, on being prevented, to claim the liberty of going elsewhere." A blockade, therefore, would be of no avail, if ships might make inquiry at the blockaded port; and here it was the duty of the captain to have made a *bond fide* inquiry, either by proceeding to *Monte Video*, or waiting until he could derive some information as to the state of the blockade, before he proceeded to *Buenos Ayres*. Although the plaintiffs have introduced a count for barratry, yet there is no evidence in the case to charge the master with that offence, neither can it be presumed that he meant to break the blockade for any purpose of his own, distinct from the interest of his employers. In the case of the *Adonis* (b), where the ship was captured in her course to *Havre*, which was under blockade, and the master gave a strange and incredible account, from which it might be inferred that he

(a) 5 Rob. Adm. Rep. 80, 81.

(b) Id. 256.

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was induced to make a deviation from some sinister intention, Sir *William Scott* said (a)—“ I will not say that the fact may not exist, that a master should commit a barratry in a case of this kind; but I think myself justified in holding that the owner cannot be admitted to go into proof on this point, on account of the fraudulent abuse to which such a liberty must inevitably lead; since it would be perfectly easy at any time to set up the pretence, and equally impossible, on the other side, to detect it.” In order to constitute barratry, there must be some breach of trust in the master, *ex maleficio*: and in *Everth v. Hammam* (b), where the master of a vessel, condemned for a breach of blockade, deposed that he was bound for another destination; it was held that it did not so disaffirm his owners' privity and consent to the breach of blockade, as to enable the plaintiff to recover as for a loss by barratry; and Lord Chief Justice *Gibbs* said—“ The master cannot be fixed with barratry, unless he acts criminally;” and here no criminal intention can be imputed to him, so as to render the defendant and the other underwriters liable on the policy.

Mr. Serjeant *Spankie*, in reply.—The owners and the captain commenced the prosecution of the voyage *bond fide* and legally, and, by his instructions, he was expressly put upon his guard against performing any act which could be construed into a violation of the laws of the blockade, which might render him exposed to injurious delay or detention. He was prosecuting the voyage with good faith, and consistent with the law of nations, at the time he came in sight of the *Brasilian* squadron. His touching at *Monte Video* was not a condition precedent, nor was he bound to make inquiries there, or at any specific port. It was contemplated that he might come in contact with *Brasilian* cruisers off the port of blockade, and that he might

(a) 5 Rob. Adm. Rep. 261.

(b) 6 Taunt. 375.

be warned off by them; and his immediately coming to an anchor when he saw the squadron, instead of endeavouring to escape, was a sufficient discharge of his duty, and in strict conformity with his instructions. But, independently of this, the sentence of condemnation is ambiguous upon the face of it, and its meaning is unintelligible;—the Court cannot ascertain with certainty the ground on which the Judge of the Prize Court proceeded in condemning the ship; and the case of *Calvert v. Bovill* is an express authority to shew, that Courts of law in this country will not draw their own conclusions as to the ground of condemnation in the sentence of a foreign Court, unless they can collect from the sentence itself, an express ground on which such Court decided; and that, if the sentence be ambiguous, or if it does not appear upon the face of it on what ground the foreign Court proceeded, a Court here may receive evidence, from which they may collect the conclusion to which the Court abroad might have arrived; and here all the facts were before the Court, and it was agreed, that they should be at liberty to form the same inferences from the evidence, as the Jury might have done.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court, as follows:—

The principal question in this case is, whether the sentence of condemnation of the brig *George*, and her cargo, in the Prize Court at *Monte Video*, dated the 13th of December, 1826, is to be received in our Courts as conclusive evidence of the fact, that the ship was captured in attempting to break the blockade of *Buenos Ayres*? For, if that is to be taken as a fact conclusively proved, then the plaintiffs in this action are in no condition to recover; not upon the count for capture and detention, because such capture was occasioned by the voluntary act of the

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master, in violation of the law of nations; nor upon the count for barratry, because it appears upon the whole evidence, that the master, supposing him to have broken the blockade, acted honestly and *bona fide*; his conduct being attributable rather to ignorance, or want of caution, than to such fraudulent design as is necessary to constitute the crime of barratry.

The general law upon this subject is well known, that the sentence of a foreign Court of Admiralty, of competent jurisdiction, is binding upon all parties, and in all countries, as to the fact upon which the condemnation proceeded, where such fact appears on the face of the sentence, free from doubt and ambiguity. But it is, at the same time, as well established, that, in order to conclude the parties from contesting the ground of condemnation in an *English* Court of law, such ground must appear clearly upon the face of the sentence; it must not be collected by inference only, or left in uncertainty, whether the ship was condemned upon one ground, which would be a just ground of condemnation by the law of nations, or on another ground, which would amount only to a breach of the municipal regulations of the condemning country. The cases of *Fisher v. Ogle*(a), and *Calvert v. Bovill*(b), are express authorities to this point: and the sentence of condemnation in the latter case bears a strong resemblance to that in the present. There, Lord Chief Justice *Kenyon* said—"If, indeed, that Court had stated in their sentence, that they condemned the goods, because they were *British* property, I should have considered myself bound by their sentence; but they have assigned other reasons for their adjudication. The express grounds of the sentence of condemnation are, that the ship was destined for one of the *West India* Islands; that she was hired and loaded at *London*, and had a certain quantity of gunpow-

(a) 1 Camp. 418.

(b) 7 Term Rep. 523.

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der on board: therefore they condemned her and her cargo as good prize." The sentence in that case was:—"Forasmuch as the true destination of the said vessel was for the *English* islands, having been hired and loaded at *London*, and that there has been found on board her eighty barrels of gunpowder, the Court declares the said brig to be a good prize for the benefit of the captors."

Now, looking at the adjudicatory part of this sentence, which is the important part for the discovery of the precise ground of condemnation, it is in these terms, *viz.* "From all which, and from what the documents state, I judge the said brig *George* and her cargo to be good and lawful prize to the capturers."

The words 'from all which' refer us back to the premises, to discover the grounds of the sentence; and, in these premises, we find enumerated three distinct statements—*first*, "that it plainly appears from all the documents, that the brig sailed from *Liverpool* knowing of the blockade, and which the captured do not even deny, nor that her destination was *Buenos Ayres*, at a short distance from which she was taken—*secondly*, that, for the reason last given, she ought to be considered as violating the blockade—*thirdly*, that the ship had not even the plausible excuse of coming to *Monte Video* first, and thereby complying with the published instructions." Now, upon referring to these premises, we think we cannot safely infer that the precise ground of condemnation was the attempt to break the blockade. The first statement refers to the illegality of the ship's destination from *Liverpool* to *Buenos Ayres*, then being under blockade. It is impossible to say with certainty that the sentence may not have proceeded on that ground, in part, if not altogether. It is more than probable it did so; for, in another part of the premises, the Judge reverts to this statement in these terms—"Forasmuch as besides not doing away the proof that *Buenos Ayres* was the first port the shipment was destined for, in itself criminal." But, if this was the ground

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on which the sentence proceeded in the first place, it is no ground for condemnation by the law of nations, unless there was an intention to violate the blockade; and, in the next place, the sentence leaves untouched the question of fact, whether the blockade was broken, or attempted to be evaded. If it formed an ingredient in the judgment of the *Brazilian* Court of Admiralty, no one can say how much it weighed with them, or that, if this ground of condemnation had been out of the case, the Court intended to rely on the fact of the blockade being broken as their ground of adjudication. Again, in the latter part of the preamble to the sentence, the Judge refers to a non-compliance with published instructions, as a charge against the master of the ship. What these instructions are, does not appear; whether some regulations ordained by their own authority or not, is uncertain. But, if this, which is no ground of condemnation by the general law of nations (a), operated on the mind of the foreign Judge to condemn the ship and cargo, there is an end again to the conclusive finding of the fact, that the ship violated the blockade of *Buenos Ayres*.

Still further, the terms in which the fact of the violation of the blockade is adverted to in the preamble of the sentence, are far from direct and declaratory, but afford, at most, an inference that the Judge felt himself warranted in drawing such a conclusion. "For this reason," says the Judge, "she ought to be considered as violating the blockade, and which she would have effected but for the diligence of the captors."

Under a sentence, therefore, expressed with so much doubt and ambiguity as to the real ground on which it proceeded, we hold ourselves at liberty to determine, whether, upon the evidence given at the trial, such violation of the blockade did in fact take place or not; and, upon that question, we are satisfied on the evidence, that the

(a) *Mayne v. Walter*, E. T. 22 Geo. 3; Park on Insur. 6th edit. 474.

captain did not break, nor did he intend to break the blockade, but that he honestly intended to obtain instructions from the blockading squadron, not having been before warned off by any of the *Brasilian* cruisers.

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The only remaining objection that has been insisted on against the plaintiffs' right to recover is, that the voyage in question was an illegal voyage in its commencement, because the ship was destined to a port which was notified to be under blockade. But that this was not an illegal voyage, was determined so lately by the Court of *King's Bench* (a), upon a voyage described in the policy in the very same terms as the present, and under circumstances so precisely similar, that it is unnecessary for us to say more, than that we entirely concur with the judgment there given, founded, as it is, upon the authority of Lord *Stowell's* judgment in the case of the *Shepherdess* (b).

We therefore think the verdict should stand, and that judgment should be entered for the plaintiffs.

Judgment for the plaintiffs.

(a) *Naylor v. Taylor*, 9 Barn. & Cres. 718; S. C. 4 Man. & Ry. 526.

(b) 5 Rob. Adm. Rep. 262.

HOLDING v. PIGOTT.

Monday,
May 9th.

THIS was an action of trespass, for stopping the plaintiff's waggon and horses. The declaration alleged, that the

A tenant held a farm under a lease, containing (among others) a condi-

tion that the wheat land should be summer fallowed and well manured for the crop. By the custom of the country, a tenant who had sown his land with wheat after a crop of turnips at the wheat seedness next before the expiration of his tenancy, was entitled to cut and carry away one half of the wheat so sown:—*Held*, that as the condition in the lease was confined to the period of holding the farm, and not to the time of quitting, the tenant was entitled to the benefit of the custom, giving him a right to a proportion of the wheat sown by him after turnips, leaving the landlord to his remedy for breach of covenant; and, therefore, that the in-coming tenant had no right to seize a waggon of the off-going tenant, who entered on the land so sown after turnips, after the expiration of his tenancy, for the purpose of taking away a moiety of a crop of wheat.

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defendant, on the 1st *May*, 1830, to wit, at the parish of *Prees*, in the county of *Salop*, with force and arms &c., stopped a certain waggon, and divers, to wit, four horses harnessed thereto, of and belonging to the plaintiff, the said waggon being then and there loaded with divers, to wit, one hundred sheaves of wheat, one hundred sheaves of barley, one hundred sheaves of straw, and one hundred bushels of other corn, of and belonging to the plaintiff, and which said waggon, wheat, barley, straw, and other corn, were then and there of a certain great value, to wit, of the value of 150*l.*, and then and there unhooked, unharnessed, and unfastened the horses of the plaintiff from the loaded waggon of the plaintiff, and then and there harnessed and fastened other horses to the said loaded waggon, and then and there seized, took, and drove the same with the said wheat, barley, straw, corn, and other goods and chattels laden thereon as aforesaid, away, and converted and disposed of the said waggon, wheat, straw, corn, and other goods and chattels so laden thereon as aforesaid, to his, the defendant's, own use.

The defendant pleaded—*First*, the general issue of not guilty—*Secondly*, that, as to the stopping of the said waggon and horses, and harnessing and fastening other horses to the said waggon, and seizing, taking, and driving the said waggon away, and converting and disposing of the said waggon to his, the defendant's, own use, the plaintiff ought not to have or maintain his aforesaid action in respect thereof, against him, the defendant, because he said, that, before and at the said time when &c. he, the defendant, was lawfully possessed of a certain close or piece or parcel of land called the *Rack Field*, situate and being in the parish aforesaid, in the county aforesaid; and because the said waggon and horses, at the said time when &c., were wrongfully in and upon the said close or piece or parcel of land, encumbering the same, and doing damage there to the defendant, he, the defendant, at the said time when &c., stopped the said waggon and horses

in the said close, piece, or parcel of land, so encumbering the same as aforesaid, and then and there harnessed and fastened other horses to the said waggon, and seized, took, and drove the said waggon away to a small and convenient distance, to wit, in the parish aforesaid, and there left the same for the use of the plaintiff, doing no unnecessary damage to the same on that occasion, and as he, the defendant, lawfully might, for the cause aforesaid; which are the same supposed trespasses in the introductory part of this plea mentioned, and whereof the plaintiff hath above thereof complained against him the defendant;—and this &c., wherefore, &c.

The plaintiff joined issue on the first plea of not guilty, and replied to the second; that, long before the said time when &c., to wit, on the 3rd *June*, 1825, at the parish of *Prees* aforesaid, in the county aforesaid, he, the plaintiff, had become and was tenant to one *George Naylor*, of a certain messuage, buildings, farm, and land, situate in the said parish of *Prees*, comprising, amongst other closes, pieces, or parcels of land, the said close, piece, or parcel of land in the second plea mentioned, and in which &c., called the *Rack Field*, that is to say, as tenant thereof from year to year, for so long time as the plaintiff and the said *George Naylor*, or other the person or persons for the time being entitled to the reversion of and in the said messuage, buildings, farm, and land, should respectively please; and that the tenancy of the plaintiff of and in the said farm and land (except a certain close, parcel thereof, used as a boozy pasture), and of and in the said messuage and buildings, commenced on and from the 25th *March*, 1825; and the tenancy of the plaintiff of and in the said close, parcel of the said farm, used as a boozy pasture, and of and in the said messuage and buildings, commenced on and from the 1st of *May*, 1825, to wit, at the parish aforesaid, in the county aforesaid. The plaintiff then averred, that he continued to occupy the said farm and land, compris-

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ing the said close in which &c., called the *Rack Field*, and the said other closes, pieces, or parcels of land (except the said close, piece, or parcel of land used as a boozy pasture,) as such tenant thereof as aforesaid, until and upon *Lady-day*, in the year 1830, when his said tenancy of and in all the said closes, pieces, and parcels of land (except the said close used as a boozy pasture) ended and determined; and that he continued to occupy the said messuage, buildings, and close used as a boozy pasture, as such tenant thereof as aforesaid, until and upon the 1st of *May* in that year, when his said tenancy of and in the said messuage, buildings, and close, used as a boozy pasture, also expired, to wit, at the parish aforesaid:—and the defendant, thereupon, at the said respective times last aforesaid, became and was the next succeeding and in-coming tenant and occupier of the said messuage, buildings, and farm and lands, to wit, at the parish aforesaid. The plaintiff then averred, that, long before either of the said several and respective times hereinbefore mentioned, and during all the time he, the plaintiff, continued to occupy the said messuage, buildings, farm, and land, there was and still is, and from time whereof the memory of man is not to the contrary, there hath been a certain ancient and laudable custom, used and approved of within the said parish—that is to say, that every tenant and occupier of any lands within the same parish, holding from year to year, such year ending on the 25th day of *March*, or on the 1st day of *May*, and who had sown any of his land with wheat on a fallow at the wheat seedness next before the expiration of his tenancy, and had afterwards reaped the wheat growing on such land, as and for a part of his 'way-going crop, hath been used and accustomed to, and of right ought to have, take, and enjoy to his own use, two third parts of such wheat, and to leave the other third for the in-coming tenant; and that every such tenant who had sown any of his land with wheat after

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a crop of turnips, at the wheat seedness next before the expiration of his tenancy hath been used and accustomed, and of right ought to have, take, and enjoy to his own use, and to reap, cut, and carry away, when ripe and fit to be reaped and carried away, his 'way-going crop; that is to say, one half of the wheat so sown after a crop of turnips as aforesaid, and to leave the other remaining half part thereof for the use of the in-coming tenant. The plaintiff then averred, that, at the wheat seedness next before the expiration of his said tenancy of and in the said messuage, buildings, and land, that is to say, on the 15th *November*, 1829, and in the season next after the said field, called the *Rack Field*, had been sown with turnips as aforesaid, he, the plaintiff, sowed with wheat the said field, called the *Rack Field*, after such crop of turnips, as aforesaid; and that afterwards, and after the expiration of the said tenancy of the plaintiff, and whilst the said messuage, buildings, farm, and land, were in the tenancy and occupation of the defendant, as such succeeding and in-coming tenant as aforesaid, to wit, on the day and year in the declaration mentioned, he, the plaintiff, cut down and reaped the said wheat growing on the field called the *Rack Field*, and so sown by him as aforesaid; and afterwards, to wit, on the same day and year last aforesaid, at the parish aforesaid, he, the plaintiff, by and with the approbation, consent, and concurrence of the defendant, did set apart one half part of the said wheat so cut down and reaped as aforesaid, and did leave the same for the use of the defendant; and, by and with the like approbation, consent, and concurrence of the defendant, did reserve and keep the other and remaining half part for the use of himself, the plaintiff:—and that afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, he, the plaintiff, did go to and enter the said field, called the *Rack Field*, with the waggon and horses in the declaration mentioned, for the purpose of housing and carrying away the said half part of the said wheat

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so reserved and kept by, and so belonging to him, the plaintiff, as aforesaid; and did then and there load the said waggon with a certain quantity of the said last-mentioned wheat, to wit, the said quantity in the declaration mentioned, and was then and there about to drive away the said waggon and horses, with the said wheat thereon as aforesaid, from and out of the said field, called the *Rack Field*, into a convenient place, for the preserving and keeping of the same last-mentioned wheat, until the defendant, of his own wrong, stopped the said waggon and horses in the declaration mentioned, and harnessed and fastened other horses to the said waggon, and seized, took, and drove the said waggon away, and converted and disposed of the said waggon to his, the defendant's, own use, in manner and form as the plaintiff had above in his declaration complained against him the defendant: And this, &c., wherefore, &c.

Rejoinder—That although the plaintiff had become and was tenant of the said messuage, buildings, farm, and lands, in the replication to the second plea mentioned, and continued to occupy the said farm, land, and premises, as such tenant thereof as aforesaid, until and upon the respective times in the said replication in that behalf mentioned, in manner and form as the plaintiff had therein in that behalf above alleged:—for rejoinder, nevertheless, to the said replication, the defendant said, that the plaintiff, during all the time aforesaid, held and occupied the said farm, land, and premises, with the appurtenances, under and subject to the following, amongst other terms and conditions:—that is to say, that he should not grow more than twenty-two acres of winter corn in any year; that the wheat land should be summer fallowed and well manured for the crop; that the plaintiff should spend all the fodder, hay, straw, turnips, &c. &c., on the premises, and in all respects should occupy the said land in a husband-like manner, to wit, at the parish aforesaid, in the county aforesaid. The defendant then aver-

red, that the plaintiff did not, in the summer next preceding the expiration of his said tenancy, and at the time when he so sowed the said field, called the *Rack Field*, with wheat as aforesaid, summer-fallow the said field, called the *Rack Field*, and well manure the same for the said crop of wheat so sown thereon at the wheat seedness preceding the expiration of his said term as aforesaid, but wholly neglected so to do; and, on the contrary thereof, sowed the said field, called the *Rack Field*, with wheat, at the wheat seedness next before the expiration of his said tenancy, without summer-fallowing and well manuring the same for the said crop of wheat, the said field having been sown with and producing a crop of turnips in the season next before the wheat seedness, when the said field was so sown by the plaintiff with wheat, as in the said replication mentioned, contrary to a husband-like manner, and to the tenor and effect, true intent and meaning of the terms and conditions on which the plaintiff so held and occupied the said field, as such tenant thereof as aforesaid, to wit, at the parish aforesaid, in the county aforesaid. And this, &c., wherefore, &c.

To this rejoinder the plaintiff demurred generally, and the defendant joined in demurrer.

The cause came on for argument on a former day in this term.

Mr. Serjeant *Russell*, for the plaintiff, and in support of the demurrer.—The rejoinder is bad—*First*, because the custom of the country as to the 'way-going crop is not excluded by the conditions of demise, as those conditions do not provide for or affect the rights of an off-going tenant;—and *Secondly*, such custom is not excluded by the off-going tenant's breach of one of the conditions, because such breach was a matter solely between such tenant and his landlord. *First*, the conditions of demise, as set out in the rejoinder, do not exclude the custom of the

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country. The case of *Wigglesworth v. Dallison* (a) established the principle, that, although a farm be held under a written agreement, the custom of the country may be insisted on, provided it be not excluded by the terms of the agreement. There, it was contended, that a lease by deed precluded the operation of the custom, as the parties must be supposed to have described all the circumstances relative to the intended term in the written instrument; but Lord *Mansfield* said—"The lease being by deed does not vary the case. The custom does not alter or contradict the agreement in the lease; it only superadds a right which is consequential to the taking." There, the alleged custom was for tenants to have the 'way-going crops after the expiration of their terms; and it was held to be a valid custom. In *Senior v. Armytage* (b), a custom for the tenant, to provide work and labour, tillage, sowing, and all materials for the same in his away-going year, and for the landlord to make him a reasonable compensation for the same, was held valid, although the farm was held under a written agreement; and the Court of *King's Bench* decided, that unless the agreement in express terms excluded the custom, it was still operative; and they set aside a nonsuit, which was directed on the ground that the custom was controlled by the agreement, and ordered a new trial; and on the cause being re-tried before Mr. Baron *Thompson*, he said—"That as to the special agreement, in order to control the custom, it must be of such a nature that it operated upon and prevented, in express terms, the custom from attaching." In *Webb v. Plummer* (c), by the custom of the country, the out-going tenant was entitled to an allowance for foldage from the in-coming tenant. But, as a lease specified certain payments to be made by the in-coming to the out-going

(a) 1 Doug. 201.

(b) Holt's Ni. Pri. Cas. 197.

(c) 2 Barn. & Ald. 746.

tenant at the time of quitting the premises, among which there was not included any payment for foldage, it was held, that the terms of the lease excluded the custom, and that the out-going tenant was not entitled to any allowance in respect of foldage. That case, however, is distinguishable from the present, as there, by the express terms of the lease, which specified certain particular payments to be made *on quitting* the premises, the custom of the country as to the payment of foldage was waived; and Mr. Justice *Bayley* said—"Where there is a written agreement between the parties, it is naturally to be expected that it will contain all the terms of their bargain; but if it is entirely silent as to the terms of quitting, it may let in the custom of the country as to that particular." As, therefore, that case turned entirely on the express stipulations in the lease as to quitting the premises; it did not vary or entrench upon the principle established in *Wigglesworth v. Dallison*, and *Senior v. Armytage*; and here, the conditions were silent as to the terms of the plaintiff's *quitting* the farm; and as he was to spend all the fodder, hay, and straw upon the premises, it cannot be taken to relate to the terms or time of the plaintiff's quitting, but only to the period of his holding.

Secondly, the defendant, as the in-coming tenant, cannot take advantage of the breach of the condition by the plaintiff as to summer-fallowing and manuring for a crop of wheat, because such breach was solely a matter between him and his landlord; for, in *Boraston v. Green (a)*, it was held, that trover does not lie by an in-coming tenant to recover the value of the 'way-going crops taken by the off-going tenant, contrary to the stipulations contained in his lease, because the proper remedy for any mismanagement of the land during the term does not appertain to the in-coming tenant, but to the landlord; and Mr. Justice *Bayley* there said—"If land has not been properly manured by the te-

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nant, the landlord will have his remedy against him upon his covenant or agreement for the abuse of the land, but the landlord is the proper party to have that remedy, and not the in-coming tenant."

Mr. Serjeant *Jones, contra.*—It is not necessary to dispute the doctrine or principle established by the cases of *Wigglesworth v. Dallison*, and *Senior v. Armytage*, for, as the plaintiff held under a condition (among others) that the wheat land should be summer fallowed, and well manured for the crop, no custom for a 'way-going crop of wheat sown after a crop of turnips can possibly apply. The conditions under which the plaintiff held, had no reference to the custom. If a tenant holds under a lease or agreement which specifies any of the terms of quitting the premises, the Court must proceed upon that instrument alone, for the custom of the country only applies to those cases where the specific terms of holding are unknown; and if sufficient circumstances appear to exclude the custom, the stipulations or conditions contained in the lease or agreement must regulate the rights of the parties. So, if any condition be repugnant to, or incompatible with the custom, the latter must be wholly excluded; and here, as the terms of the holding are inconsistent with the plaintiff's taking the 'way-going crop, it must be considered as if there were an express stipulation or condition to that effect. The true distinction is, that a custom may be resorted to, and relied upon, if it be collateral to the contract; but that, if the contract contains a condition, or expresses any thing contrary to the custom, the tenant cannot take advantage of it. If the plaintiff, as the off-going tenant, notwithstanding the condition that the wheat land should be summer fallowed, could call in aid the custom of the country to take his 'way-going crop of wheat after a crop of turnips, he would obtain such crop in violation of his contract; and although it has been said that the defendant cannot take advantage of the breach of the con-

dition, as it was a matter between the plaintiff, as the outgoing tenant, and his landlord, yet the plaintiff's interest ceased immediately on his quitting the premises; and it was incumbent on him to shew his right to come on the land afterwards; particularly, as his right to the moiety of the 'way-going crop could not be acquired under the custom of the country, as he was expressly excluded by the condition set out in the rejoinder, which is a sufficient answer to the replication. In *Boraston v. Green*, the question was, whether trover would lie by an in-coming tenant, to recover the value of 'way-going crops taken by the off-going tenant, who continued to hold the land as tenant from year to year, after the expiration of an old lease, which reserved to him a right to reap and carry away corn sown at the winter seedness preceding the expiration of the lease; and the Court most properly decided that trover was not the proper action to try a question as to the land; and Lord *Ellenborough* said—"It would be most incongruous to say, that trover lies by the in-coming tenant for the off-going crop when severed, or because there has been an inadequate performance of the conditions on which the off-going tenant was to raise and take such crop:" and although Mr. Justice *Bayley* said, that the landlord was the proper party to have his remedy against the tenant, upon his covenant, for the abuse of the land, yet it had reference to the form of action; for that learned Judge said, in the sentence immediately preceding—"That it would be unheard of to be trying in an action of trover, whether the land had been properly summer-fallowed or manured by the tenant."

Mr. Serjeant *Russell* in reply.—It is quite clear, that if the plaintiff has been guilty of a breach of the condition for not summer-fallowing and well manuring the close, called the *Rack Field*, for wheat, he is liable to an action at the suit of his landlord; for the injury, if any, is done

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to him alone, and not to the defendant, as the in-coming tenant. But the custom of the country is not excluded by the condition that the wheat land should be summer-fallowed and well manured for the crop, for such condition only refers to the mode of holding, and not to the time or terms of *quitting* the premises, and the demise is altogether silent as to the 'way-going crops. Besides, by one of the conditions set out in the rejoinder, the plaintiff was to spend all the fodder, hay, straw, &c., upon the premises, which could not relate to the terms or time of his quitting, as it would be impossible for the off-going tenant to do so.

Cur. adv. vult.

Chief Justice TINDAL now delivered the judgment of the Court, as follows:—The question in this case arises on the sufficiency of the defendant's rejoinder to that replication of the plaintiff, which he has put in to the defendant's second plea of justification. The plaintiff, in his replication, sets out a custom within the parish, where the *locus in quo* is situate, for every tenant and occupier of land in the parish, holding from year to year, whose tenancy of land expires at *Lady-day*, "where he had sown any of his lands with wheat on a fallow, at the wheat seedness next before the expiration of his tenancy, and had afterwards reaped the wheat growing on such land, as and for a part of his 'way-going crop, to take and enjoy to his own use two-third parts of such wheat, and to leave the other third for the in-coming tenant; and where such tenant had sown any of his land with wheat, after a crop of turnips, at the wheat seedness next before the expiration of his tenancy, to take to his own use, and to reap, cut, and carry away, when ripe and fit to be reaped and carried away, his 'way-going crop, that is to say, one half of the wheat so sown after a crop of turnips, and to leave the other remaining half part thereof for the use of the in-

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coming tenant." Now, in answer to this replication, the defendant rejoins, that the plaintiff held his farm, of which the *locus in quo* forms a part, "under and subject to the following conditions, that is to say, that he should not grow more than twenty-two acres of winter corn in any year; that the wheat land should be summer-fallowed, and well manured for the crop; that the plaintiff should spend all the fodder, &c., on the premises, and occupy the land in an husband-like manner;" and the defendant then proceeds to allege, that the plaintiff did not summer-fallow the field in which &c., and well manure the same for the said crop of wheat; but, on the contrary, sowed the said field with wheat, at the wheat seedness next before the expiration of his tenancy, without summer-fallowing and well manuring." The point, therefore, is, whether the terms upon which the plaintiff held his farm are so inconsistent with the custom for the 'way-going crop, as to prevent the plaintiff from claiming, under the custom, his right to the share of the wheat after he had reaped it, and also the right to drive his waggon on the land, to take it away. Now, it seems clear, that the plaintiff, in order to shew any title to the wheat, must bring himself within the custom for the 'way-going crop; for, inasmuch as the wheat was growing, at the time it was cut, on the land occupied by the defendant, such wheat would, *prima facie*, belong to him; and the plaintiff could only make title to it, either under a reservation in his former lease, which, being granted by the same person under whom the defendant holds, and being prior in point of date, would bind the defendant; or by a custom which binds the plaintiff and his former landlord, and, through him, the present defendant. But there was no reservation or agreement contained in the lease applying to a 'way-going crop, and, consequently, the plaintiff's right to the wheat, if it exists, must depend upon bringing his case within the custom. It is contended, however, on the part of the defendant, that the plaintiff

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held on such terms as excluded the application of the custom at all; or, in other words, that, holding as he did, on the condition that the wheat land should be summer-fallowed, no custom in the parish for a 'way-going crop of wheat sown after a crop of turnips, could apply to his case; and this appears to be the real question between the parties. It may be useful to consider this case, as if the contest arose between the out-going tenant and the landlord, for that is the strongest test to which the right of the out-going tenant can be submitted. It may be admitted, that if any condition is found in the lease necessarily repugnant to, or inconsistent with, the custom, the latter is excluded; for it can only be called in aid where the former is silent upon the subject. In considering whether there is in this case such inconsistency or repugnancy, the first observation that arises is this: that the agreement set out in the rejoinder is silent altogether as to any terms on which the tenant shall quit; the stipulation is confined expressly to the period *of holding* by the tenant. It adverts to nothing that is to take place at the termination of the tenancy; it speaks only of the terms of holding during its continuance. There is nothing, therefore, in such an agreement, directly at variance with the application of a custom between the landlord and tenant, where such custom does not come into force and existence until the expiration of the term. The rights of the landlord and tenant may be governed by the terms of the agreement during the tenancy, and by the terms of the custom immediately afterwards; and this distinguishes the present case from that of *Webb v. Plummer* (a), where there were express stipulations relating to the rights of the out-going and in-coming tenant at the termination of the lease, and which, therefore, were held to exclude the custom.

In the next place, it is to be observed, that the custom

(a) 2 Barn. & Ald. 746.

is in the affirmative, *vis.* that the tenant shall have one proportion of the wheat for a 'way-going crop, if sown after a summer-fallow, another proportion, if sown after turnips: the covenant in the lease is affirmative also, *vis.* that the wheat land shall be summer-fallowed. Why may not the affirmative custom and the affirmative covenant subsist together; the landlord having the right to recover a compensation in damages, if the affirmative covenant is not observed; the tenant, on the other hand, claiming his 'way-going crop in wheat sown after turnips, according to the affirmative terms of the custom? The defendant requires the same effect to be given to the affirmative stipulation, that the tenant would sow after summer-fallowing, as if there had been an express stipulation in the negative, either that the tenant should take no way-going crop on his quitting, or as if he had agreed, that in case he sowed wheat on land not summer-fallowed, he would forfeit his claim to a 'way-going crop thereon; in both which latter cases, no doubt could be entertained but that the custom would be excluded by the express contract of the parties. Again, it is to be observed, that there is another condition of holding, *vis.* that the tenant should not grow more than twenty-two acres of winter corn in any year; and if the landlord has the right to exclude the custom in the case already considered, so also he ought to be able, if the tenant exceeded that quantity, to contend, that the corn would be his own; the one is as inconsistent with the existence of the custom in its alleged extent as the other. But, in the case of *Boraston v. Green* (a), it was held, that the landlord could not have his election, either to take a small compensation in damages for a trifling excess of sowing beyond the twenty-two acres, or the 'way-going crop itself. Indeed, it would be difficult to say at what precise time the property in this corn can be supposed to

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vest in the landlord. At the moment the wheat is sown upon turnips, the property is in the tenant, and, at all events, would continue so until the expiration of the term. The property in the corn would not vest in the landlord, though sown in breach of the covenant.

Again, at the moment the wheat is sown, a right of action for damages would vest in the landlord, and so would continue to the end of the term. It is difficult to perceive any principle on which the landlord's right to an action for damages ceases, and the property in the growing wheat becomes vested in him instead thereof. The case of *Boraston v. Green* (a), both in its decision, and in the reasons given by Lord *Ellenborough* and Mr. Justice *Bayley*, go strongly to the principle, that the landlord would have his remedy by action, and the tenant would have the wheat under the custom. Now, if this is the conclusion, in case the landlord had taken the premises at the expiration of the term, it must be equally so, at least, where there is a new in-coming tenant. For here, the landlord lays no claim at all to the crop, he does not even insist upon the damages for the breach of covenant. But the tenant, who is not entitled to those damages, sets up the breach of covenant made with his landlord as a ground for divesting from the out-going tenant the property in the corn, which he claims under the custom. Indeed, it might be fairly contended, that the custom set out in the record is evidence of an agreement made directly between the out-going and the in-coming tenants, to which the in-coming tenant, upon the facts pleaded, appears to have given his assent; and if so, the right of action for damages on the part of the landlord against the out-going tenant appears to be *res inter alios acta*, which can have no effect on the right of the plaintiff and defendant, under such agreement. On these grounds, we think the custom still applies, to give

(a) 16 East, 71.

the off-going tenant the right to a proportion of the corn sown by him after turnips, leaving the landlord to his remedy for breach of covenant: and we are glad to find the law concurs with the justice and honesty of the case, when we give—

Judgment for the plaintiff.

DELEGAL and Others v. NAYLOR.

A **BRITISH** brig, the property of the plaintiffs, having, in 1827, been improperly confiscated and detained at *Peru*, by order of the government there, they, through the interposition of the *British* government, agreed to make the plaintiffs a compensation, which the *Peruvian* government paid in paper money, called *Billetes*, which purported, upon the face of them, to amount to 16,011 dollars. The plaintiffs afterwards gave notice to the defendant, who was residing at *Lima*, to hold the *billetes* to their use; and they subsequently required him to deliver them up; and, on his refusing to do so, the plaintiffs commenced an action of trover against him. On the cause coming on for trial at the sittings after *Hilary* Term, 1830, it was agreed to refer the cause, and all matters in difference, to an arbitrator, who, on the 4th *March*, 1830, made his award in favour of the plaintiffs, and directed that judgment should be entered for them for 5,000*l.*, but that execution should not be sued out for more than the value of the *billetes*, at the rate or price at which they were current at the date of the award, or at the time of suing out the execution.

The Court afterwards ordered that execution should only issue for the value specified in the *billetes*, which value was to be estimated by the Prothonotary, at the rate at which the *billetes* were current at the time of the award;

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In trover, for *billetes* paid to the plaintiffs by the *Peruvian* government, and purporting to be of the value of 16,000 dollars; the cause was referred to arbitration; and an award having been made in favour of the plaintiff, the Court ordered the value of the *billetes* to be estimated by the Prothonotary, at the rate at which they were current at the time of the award:—*Held*, that such value was to be estimated as the value of a bill of exchange for the amount of the dollars specified in the *billetes*, upon a solvent house in the country where they were issued, although they were at a considerable discount at the time of making the award.

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upon which the defendant engaged to deliver them up to the plaintiffs on the 15th *November*, 1830, or to pay the value which might be found by the Prothonotary. The Prothonotary afterwards stated to the Court, that he had found the value of the *billetes* to amount to 3,460*l.* 12*s.* 6*d.*, and that, in coming to that conclusion, he had estimated the dollar at the rate of 4*s.* 1*d.*, that being its value in this country, and that the *billetes* were worth the number of dollars they purported upon the face of them to represent.

The defendant shipped the *billetes* on board the *Thetis* at *Lima*, and insured them from thence to this country, and the vessel having been lost at sea, together with the *billetes*—

Mr. Serjeant *Jones*, on a former day in this term, obtained a rule, calling upon the plaintiffs to shew cause why it should not be referred back to the Prothonotary to review his valuation of the *billetes*. The motion was founded on affidavits, which stated, that, at the time the award was made, the *billetes* were at a discount of between 60*l.* and 70*l. per cent.* at *Lima*; and that the plaintiffs had, about the latter end of the year 1830, directed the defendant to dispose of them at 60*l. per cent.* discount. The learned Serjeant therefore submitted, that, as they were of a mere nominal amount, the Prothonotary had come to a wrong conclusion, by finding them to be worth the number of dollars they purported to represent, as their real and intrinsic value was the rate at which they were current at *Peru* at the time of making the award, and which fact the Court expressly directed the Prothonotary to ascertain.

Mr. Serjeant *Taddy* and Mr. Serjeant *Wilde* afterwards shewed cause, upon affidavits, which stated, that the *billetes* were intrinsically worth to the plaintiffs the full value they purported to represent; and it was submitted, that

the Prothonotary had exercised a sound judgment, and come to a right conclusion, in estimating the value to the plaintiffs, according to the number of dollars the *billetes* themselves represented, *viz.* 16,011 dollars. The Prothonotary must be considered as standing in the situation of an arbitrator; and it was entirely within his province to ascertain the value of the *billetes* at the time of the making of the award. As the *billetes* were issued and paid by the *Peruvian* government to the plaintiffs, by way of compensation for the improper confiscation of their ship in the port of *Lima*, although they might be of no value in this country, nor current in the *English* market, yet they must be estimated according to their value at *Lima*; and the Court will assume, that the *Peruvian* government would not allow the plaintiffs less than the full nominal value, in case of their being duly presented at *Lima*, particularly, as they were issued by the government there, for their own benefit and advantage.

Mr. Serjeant *Jones* and Mr. Serjeant *Bompas*, in support of the rule.—The Prothonotary only ascertained the current value of the dollars, and not of the *billetes*; and he formed an improper estimate, when he found the *billetes* to be worth the number of dollars they represented, for he should have ascertained the current value of the securities themselves, at the time the award was made. The *billetes* may be assimilated to *East India* bonds, or *Exchequer* bills, the price or value of which varies daily in the market; and here the real question is as to the current value of the *billetes* in the market at *Lima*, and it is sworn that they were at a discount there, between 60 and 70 *per cent.* Besides, their value would, in a great measure, depend upon the finances or solvency of the *Peruvian* government, by whom they were issued. In the case of *M^r Arthur v. Lord Seaforth* (a), it was held, that, on a failure to replace stock, the measure

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(a) 2 Taunt. 257.

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of damages is to be estimated at the price on the day when it ought to have been replaced, or the price at the day of the trial; and here the Prothonotary should have made inquiry as to the current value of the *billetes* at the time of the making of the award, as that was the only question submitted to his consideration; and as the plaintiffs had directed the defendant to dispose of the *billetes* at 60 per cent. discount, it cannot be assumed that the *Peruvian* government would have paid the full nominal value, when they were at such an enormous discount in the market at *Lima*.

Cur. adv. vult.

Lord Chief Justice TINDAL now said—We have looked into all the affidavits in this case, and think that it should be referred back to the Prothonotary to re-value the *billetes*, on this principle:—It seems to us, that their value should be taken as 16,011 dollars, such being the value specified in the body of the instruments. That the plaintiffs should be placed in the same situation, as if they had in their hands a bill of exchange for 16,011 dollars, on a house of unquestionable reputation, respectability, and solvency at *Lima*. The amount to be obtained for such a bill would depend, not on the current value of the dollars alone, but on the rate of exchange resulting from the expense and risk of the transfer of the bill between *London* and *Lima*. We, therefore, think that this case must go back to the Prothonotary, for the purpose of his ascertaining what such a bill was worth in *London*; and the plaintiffs will be entitled to a sum according to that value. The rule, therefore, for referring it back to the Prothonotary to revalue the *billetes* must be made—

Absolute (a).

(a) See *Scott v. Bevan*, 2 Barn. & Adolph. 78, where, in an action brought in this country, to recover the value of a given sum, *Jamaica* currency, upon a judgment obtained in that island; the value was

held to be that sum in sterling money which the currency would have produced, according to the actual rate of exchange between *Jamaica* and *England*, at the date of the judgment.

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Monday,
May 9th.

THIS was an action on a policy of assurance, by which the plaintiffs sought to recover an average loss on a cargo of sugars shipped on board the *Chauncy*, Captain *James Moffatt*, upon a voyage from the *Havannah* to *Gibraltar* and *Malaga*. The plaintiffs insured the sum of 4150*l.* with the defendants, 2000*l.* with the *Patriotic Assurance Company*, and 500*l.* with the underwriters at *Lloyd's*, on the above cargo. The ship sailed from the *Havannah*, bound to *Malaga*, on the 26th of *October*, 1827. On the 28th she sprung a leak, and was towed back to the *Havannah*, and run ashore on the 29th. The present action was commenced in *Hilary Term*, 1828; and, on the 26th of *April* following, the defendants filed a bill in equity in the Court of *Exchequer*, praying for an appearance to an injunction to restrain the plaintiffs from further prosecuting or proceeding in any action at law, and also for a commission for the examination of several witnesses on interrogatories at the *Havannah*, *Matanzas*, and other parts beyond the sea. The plaintiffs having caused an appearance to be entered to this bill, an injunction was issued on the 30th of *June*, to restrain the plaintiffs in this action from commencing or prosecuting any action or suit at law against the defendants, touching the matters in the bill mentioned; and it was further ordered by the Court of *Exchequer*, that the plaintiffs should wholly desist from the commencing or further prosecuting any such action or suit, as aforesaid, and all manner of proceeding thereon, until the

In an action by the plaintiffs, to recover an average loss, the question being, whether the ship was sea-worthy at the time she sailed from a foreign port, the defendants (underwriters) filed a bill in equity for an injunction, and also for a commission to examine witnesses abroad. After the injunction was sued out, the plaintiffs sent for the captain at the *Havannah*; and, shortly after his arrival, the defendants obtained an order from the Court of *Exchequer*, to examine him on interrogatories, and that the plaintiffs might cross-examine him. The defendants afterwards sued out a commission to examine witnesses at the *Havannah*, which, not being returned within the time prescribed by the Court of *Exchequer*, the de-

fendants paid the loss, without proceeding to trial:—*Held*, that the plaintiffs were entitled to a reasonable allowance for the expenses of bringing over the witness, and also for his detention here and return home: and the Prothonotary having refused to allow such expenses, the Court directed him to review his taxation.

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coming in of the plaintiffs' answer, and the Court should further order. The plaintiff, *Lonerган*, having put in his answer, which was duly filed on the 15th *August*, 1828, the plaintiffs, on the 12th *November* following, obtained an order *nisi* to dissolve the injunction, on an affidavit stating that the answer had been put in; and, on cause being shewn, on the 21st *November*, the Court of *Exchequer* discharged the order *nisi*, and gave the defendants leave to send out a commission for the examination of witnesses at the *Havannah*, and the injunction was directed to be continued in the mean time. The following order was also drawn up:—"It appearing to the Court that *James Moffatt*, who was captain of the ship *Chauncy* in the pleadings mentioned, on the voyage therein also mentioned, was then in this country, for the purpose of giving his testimony upon the trial of the action at law between the plaintiffs and the defendants; it is further ordered by the said Court of *Exchequer*, that the defendants should be at liberty to examine the said *James Moffatt* upon interrogatories in the said action, notwithstanding the injunction of this Court, the plaintiffs being at liberty to cross-examine the said *James Moffatt*, and that the plaintiffs, if necessary, should consent to an order to be made in the said action, at the instance of the defendants, for the defendants to be at liberty to read the depositions of the said *James Moffatt*, to be taken as evidence on their behalf, upon the trial of the said action; the plaintiffs being at liberty to read the cross-depositions of the said *James Moffatt* to the cross-interrogatories exhibited by them as evidence on their behalf upon the said trial."

A commission was accordingly sent out to the *Havannah* on the part of the defendants; and not having been returned, the plaintiffs, on the 7th *December*, 1829, moved to dissolve the injunction; and, on the 10th, the Court of *Exchequer*, by an order of that date, directed, that, unless the commission was returned on or before the eighth day of *Hilary* Term, 1830, the injunction was to stand

dissolved. The commission not having been returned according to that order, the defendants paid the plaintiffs the amount of their claim as for an average loss, according to the sum insured with them under the above policy. The plaintiffs, after the commencement of the present action, and before the issuing of the injunction, sent several letters to the *Havannah*, requiring the attendance of Captain *Moffatt* as a witness; and an application was accordingly made to him, at *Matanzas*, in the early part of *September*, 1828, to come to *London*, to attend the trial of the cause. He accordingly set sail on the 17th *September*, and arrived at *Liverpool* on the 13th *November* following, from whence he proceeded to *London*, where he remained until the 17th *February*, 1830.

Upon the taxation of costs before the Prothonotary, the plaintiffs claimed 533*l.* 14*s.* for *Moffatt's* expenses and loss of time during his attendance here as a witness, which sum included the expenses of his voyage from the *Havannah*, his detention here, and two months for his return home. In support of the plaintiffs' claim, their attorney produced an affidavit before the Prothonotary, which stated, that the leak which caused the loss of the ship *Chauncy* had occurred only a few hours after her sailing on the voyage insured, as appeared by the captain's protest. That the question of sea-worthiness in this case being extremely critical, the deponent deemed it unsafe to trust the trial of the cause to written depositions, so long as he could prevail on Captain *Moffatt* to remain in this country to give his evidence personally, on the trial before a Jury, inasmuch as the demeanour and manner of his giving his evidence might have great weight with them.

The Prothonotary, notwithstanding, refused to allow these costs, as it did not appear that Captain *Moffatt* had ever been examined by the defendants, pursuant to the order of the Court of *Exchequer*; and he also thought, that, as the bill for the injunction was issued in *June*, 1828, as well as the commission for the examination of wit-

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nesses at the *Havannah* and *Matanzas*, at which latter place Captain *Moffatt* resided, the plaintiffs should not afterwards have required his attendance here as a witness, but should, if possible, have prevented his coming over; besides, he did not set sail until the 17th *September*, 1828, the commission having been granted in the month of *June* preceding.

Mr. Serjeant *Bompas*, on a former day in this Term, obtained a rule *nisi* that the Prothonotary might review his taxation. In *Sturdy v. Andrews* (a), this Court allowed the costs of detaining foreign seamen in this country to give evidence upon a trial, and such costs were computed from the day of the suing out of the writ to the day of trial, although it was insisted, that the witnesses might have been examined on interrogatories, which would have rendered their detention unnecessary. Here, by the bill of injunction, the plaintiffs were merely restrained from proceeding in the action till they had put in an answer; and although Captain *Moffatt* might have been examined and cross-examined under the order of the 21st of *November*, yet the plaintiffs could not have safely proceeded to trial without having him present in Court, as, on his testimony, the question in the cause mainly depended; and his being delayed here is attributable to the act of the defendants themselves, as the commission sued out by them for the examination of the witnesses at the *Havannah* was not returned within the time limited and required by the Court of *Exchequer*.

Mr. Serjeant *Taddy* and Mr. Serjeant *Spankie* now shewed cause.—As the bill for the injunction was issued on the 30th of *June*, 1828, and Captain *Moffatt* was not applied to at *Matanzas* to come to this country to attend the trial until the month of *September* following, the de-

(a) 4 Taunt. 697.

defendants ought not to be charged with the expenses of bringing him over. Neither can they be liable for his detention after the order made by the Court of *Exchequer* in *November*, 1828, for his examination on interrogatories. The plaintiffs might have examined him if they had thought fit, and, by detaining him, they incurred an unnecessary expense. The *onus* lay on the defendants to prove that the vessel was not sea-worthy at the time she sailed from the *Havannah*. Although, in *Tremain v. Faith* (a), where a witness was sent for from abroad, *bond fide*, for the purpose of the cause, and for no other;—it was held to be in the discretion of the Prothonotary to allow the plaintiff the costs of bringing him over and of sending him back, although he should have been sent for, and have arrived before the commencement of the action; yet here, the injunction was continued and not dissolved till *Hilary* Term, 1830. The plaintiffs, previously to that time, could not have taken any proceedings in the action; and as notice of trial was never given, they were not entitled to send for witnesses abroad at the expense of the defendants; and no *subpoena* could have been issued against Captain *Moffatt* to compel his attendance as a witness in the cause pending the injunction; and as the plaintiffs might have examined him on interrogatories after the order made by the Court of *Exchequer* in *November*, 1828, the Prothonotary exercised a sound discretion in refusing to allow the costs incurred by the plaintiffs in the bringing over and detaining Captain *Moffatt* as a witness on their behalf.

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Lord Chief Justice TINDAL.—If the plaintiffs had sent for the witness rashly, the expenses which they claimed before the Prothonotary ought not to be allowed. Although the injunction was pending when the witness was applied to at *Matanzas*, yet the plaintiffs were not bound to

(a) 1 Marsh. 563; S. C. 6 Taunt. 88.

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believe or expect that it would continue. They were, therefore, entitled to send out to the *Havannah*, and endeavour to procure the *personal* attendance of Captain *Moffatt* as a witness, in case the cause should proceed to trial; which no doubt it would have done, had not the defendants paid the loss, which they did, as the commission for the examination of witnesses at the *Havannah* was not returned within the time prescribed by the Court of *Exchequer*. The commission was not sent out at the instance of the plaintiffs, but by the defendants; and, by the order of the Court of *Exchequer*, the defendants were to be at liberty to examine Captain *Moffatt* on interrogatories, whilst the plaintiffs could only cross-examine him; and they were not bound to do so, whilst they had him as their principal witness corporally here. They might most reasonably prefer that his testimony should be given in open Court. No misconduct can be imputed to the plaintiffs in sending for the witness; and as it was uncertain how long the injunction might remain in force, and it was ultimately dissolved through the negligence of the defendants in not getting the commission returned, and who paid the loss claimed by the plaintiffs without going to trial, I am of opinion that a reasonable allowance should be made to the plaintiffs for the expenses of this witness; and, therefore, that the rule for the Prothonotary to review his taxation must be made absolute.

Mr. Justice PARK.—I am of the same opinion. The plaintiffs had a right to require the personal attendance of the captain of the ship, as he was the most material witness to prove whether she were sea-worthy or not at the time she sailed from the *Havannah*; and after his arrival in this country, they were justified in detaining him, as his examination on interrogatories would of necessity be far more unsatisfactory than his *vidé voce* examination in open Court, where his testimony would be obtained in a more full and perfect manner.

Mr. Justice GASELEE and Mr. Justice BOSANQUET concurring:—The rule for the Prothonotary to review his taxation was made—

Absolute (a).

(a) See *Berry v. Pratt*, 1 Barn. & Cress. 276; S. C. 2 Dow. & Ryl. 424.

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TREGONING, Assignee of JENNER and SOPPETT, Bankrupts, v. ATTENBOROUGH (a).

Monday,
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THIS was an action of trover for haberdashery and silks, which the bankrupts had pledged with the defendant, a pawnbroker, for monies advanced. The goods deposited were of the value of 850*l.*, and the defendant, in his books, had described the transaction as consisting of several advances, each of less than 10*l.*, although such advances were made in sums of 200*l.* and upwards at one time. The Jury found a verdict for the plaintiff for the alleged value of the goods, on the ground, that the transaction was usurious; and a verdict was entered for him accordingly—damages 850*l.*, costs 40*s.*; but it was agreed, that the defendant might be at liberty to deliver up the goods to the plaintiff, and that the verdict should be reduced accordingly. An order of reference was drawn up at *Nisi Prius*, with the consent of the plaintiff and defendant, by which it was referred to an arbitrator to find to what amount, if any, the goods had been deteriorated in value, whilst they remained in the defendant's possession, which amount, together with the *costs of the cause to be taxed*, was to be paid to the plaintiff; but no mention was made in the order as to the costs of the reference. After seve-

In trover for goods, the Jury found a verdict for the plaintiff for their full value, but he consented to take them back, upon its being referred to an arbitrator to ascertain to what amount they had been deteriorated in value whilst they remained in the defendant's possession; which amount, together with the costs of the cause, were to be paid to the plaintiff; and an order of reference was drawn up accordingly. The arbitrator ordered the verdict to be reduced, but the award was silent as to the costs of the reference:—*Held*, that as the reference was for the benefit of the defendant, the costs attending it were to be taken as costs in the cause.

(a) See 4 Moore & Payne, 722.

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ral meetings before the arbitrator, he made his award, by which he found, that the goods were deteriorated in value to the amount of 120*l.*; and he made his award accordingly, by deducting that sum from the amount of the verdict, but he said nothing as to the costs. On the taxation before the Prothonotary, he not only allowed the plaintiff the costs of the cause, but also the expenses incurred in measuring and valuing the goods, and in the attendance of witnesses before the arbitrator, and his charge or fee for making the award.

Mr. Serjeant *Cross*, on a former day in this Term, obtained a rule *nisi* that the Prothonotary might review his taxation; on the ground, that, under the order of reference, the plaintiff could only be entitled to the *costs of the cause*, and not to the costs of the reference, the power of the arbitrator being confined to the costs of the cause, to be ascertained and taxed by the Prothonotary, and the award being wholly silent as to the costs of the reference, or of the award.

Mr. Serjeant *Wilde* now shewed cause.—The Prothonotary exercised a sound discretion in allowing the plaintiff the costs of the reference, as well as the costs in the cause. The plaintiff agreed to take back the goods in ease of the defendant; and as he consented to the terms of the reference, the costs attending it were in effect costs in the cause; and if it had been left to the Prothonotary to ascertain the deterioration in value of the plaintiff's property, instead of to an arbitrator, there can be no doubt but that the plaintiff would have been allowed the costs attending such reference, as being necessarily incidental to such inquiry.

Mr. Serjeant *Cross*, in support of his rule.—The costs of the reference formed no part of the submission, and the arbitrator did not mention them in his award. The de-

defendant only agreed to pay the taxed costs in the cause. It is, therefore, not only fair to assume that the arbitrator meant that each party should pay his own costs of the reference, but it would be most unjust to throw the whole expenses attending it upon the defendant; and the costs of the reference cannot be considered as costs in the cause.

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Lord Chief Justice TINDAL.—A verdict was taken for the plaintiff at the trial for 850*l.*, being the alleged value of the goods which had been deposited with the defendant; but the plaintiff consented to take back the goods upon its being ascertained whether or not they had been deteriorated in value, whilst they remained in the defendant's possession; and it was agreed that the amount of the deterioration, (if any), should be left to an arbitrator. The defendant consented to the terms of the order of reference, which were most favourable for him, as the expense of examining witnesses in Court as to the fact of the deterioration was thereby saved. It appears to me to be reasonable, that he should pay the costs of the reference. Although the order was confined to the costs of the cause, yet the expenses of ascertaining what damage the goods had actually sustained, were virtually costs in the cause. It therefore seems to me, that, as the defendant agreed to refer it to an arbitrator to ascertain the fact as to the deterioration of the property, the costs attending the inquiry before him may be considered as costs in the cause, particularly, as the reference was for the benefit of the defendant; and if the fact left to the arbitrator had been inquired into at *Nisi Prius*, it would necessarily have caused an additional expense; and the costs of the witnesses who might have been called to prove the deterioration of the goods in question, would have been allowed to the plaintiff as a matter of course.

Mr. Justice PARK.—The Jury found a verdict for the

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plaintiff to a very large amount; and it was for the benefit of the defendant, that the question as to the deterioration of the property whilst it remained in his possession, should be referred to an arbitrator; and the expenses attending that inquiry may, I think, under these circumstances, be considered as costs in the cause.

Mr. Justice GASELEE.—I agree with my Lord Chief Justice and my Brother *Park*, that the costs of the reference may, in this case, be considered as costs in the cause. The Jury found a verdict for the plaintiff for the full value of the goods, and it was clearly for the benefit of the defendant to return them to the plaintiff; therefore, the expenses attending the inquiry as to their depreciation in value from their remaining in his custody, ought to be borne by him.

Mr. Justice ALDERSON.—This is not like a case where a verdict is entered for the plaintiff for the damages laid in the declaration; for the Jury expressly found a verdict for him for the full value of the goods. It was most beneficial to the defendant to return them to the plaintiff, and it is but just that he should pay the expenses which were incurred in ascertaining the fact as to the injury they might have received during the time they were in his custody.

Rule discharged, with costs.

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IN THE EXCHEQUER CHAMBER.

LEATHLEY v. HUNTER and Others.

[In Error.]

THE plaintiffs below, (defendants in error), declared in *assumpsit* upon a policy of assurance, dated the 11th January, 1827, at and from *Sincapore, Penang, Malacca, and Batavia*, all or any, to the ships' port or ports of discharge in *Great Britain*, or to any port or ports in the United Netherlands, or to *Altona or Hamburgh*, all or any, with leave to touch, stay, and trade, at all or any ports or places whatsoever and wheresoever, in the *East Indies, Persia*, or elsewhere, as well beyond as at and on this side of the *Cape of Good Hope*, in port or at sea, at all times and in all places, and until safely arrived and landed at the ships' final port or place of discharge, upon any kind of goods and merchandize, and also upon the body, tackle, &c. &c., and other furniture of and in the good ship or vessel called the *Albion, Bolivar, Java Packet, and Blora*, all or any;—beginning the adventure upon the said goods and merchandize from the loading thereof a-board the said ships *as above*, with leave to call at or off any ports or places in *Great Britain*, and wait for orders upon the said

A policy of assurance was effected on goods by four ships named, all or any, at and from *Sincapore, Penang, Malacca, and Batavia*, all or any, to the ships' port or ports of discharge in *Great Britain*, or to any port or ports in the United Netherlands, or to *Altona or Hamburgh*, all or any, with leave to touch, stay, and trade at all or any ports or places whatsoever and wheresoever, in the *East Indies, Persia*, or elsewhere, as well beyond as at and on this side of the *Cape of Good Hope*, in

port or at sea, at all times and in all places, until safely arrived at her final port of discharge, beginning the adventure upon the goods from the loading thereof on board the said ships *as above*:—with leave for the ship in that voyage to proceed and sail to, and touch and stay at, any ports or places whatsoever and wheresoever, in any direction, and for any purpose, necessary or otherwise, particularly, *Sincapore, Penang, Malacca, Batavia*, the *Cape of Good Hope*, and *St. Helena*, with leave to take on board, discharge, reload, or exchange goods or passengers, without being deemed a deviation.—The ship took part of her cargo on board at *Batavia*, and sailed from thence in the prosecution of the adventure to *Sourabaya*, which is four hundred miles to the eastward of *Batavia*, and directly out of the course from *Batavia, Sincapore, Penang, or Malacca, to Europe*. She took other goods on board at *Sourabaya*, then returned to *Batavia*, and sailed from thence with all the goods on board, for *Europe*, but, before her arrival, was lost by perils of the seas:—*Held*, that the sailing to *Sourabaya* was a sailing on the voyage insured, that it was no deviation, and that the goods put on board there were covered by the policy.

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ship, &c., until &c. &c.; and that it should be lawful for the said ship, &c., in that voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever and wheresoever, in any direction, and for any purpose, necessary or otherwise, particularly *Sincapore, Penang, Malacca, Batavia*, the *Cape of Good Hope*, and *St. Helena*, with leave to take on board, discharge, reload, or exchange goods or passengers, without being deemed any deviation from, and without prejudice to that insurance. By a memorandum at the foot of the policy, the policy was declared to be on goods, as interest might appear, &c.

The plaintiffs below then averred, that after the making of the policy, to wit, on &c., the interest in the goods and merchandize so intended to be insured by the policy, was duly declared to be "all in the *Java Packet*, on coffee;" that the defendant below became an insurer for 300*l.*, at a premium of 6*l.* 6*s.* *per cent.*; that afterwards, to wit, on &c. 10,000 peculs of coffee, of the value of 10,000*l.*, had been and were shipped on board the *Java Packet*, at *Batavia*, to be carried and conveyed therein to *Antwerp*, being a port in the United *Netherlands* in the policy mentioned; and that afterwards, to wit, on &c., the ship sailed to, and touched and stayed at *Sourabaya*, and took 10,000 bags of coffee on board, to be carried and conveyed to *Antwerp*; that afterwards, to wit, on &c., the *Java Packet* sailed from *Batavia* on her voyage towards *Antwerp*, and that, whilst she was proceeding on her voyage with the said goods on board, and before her arrival at *Antwerp*, she was lost by the perils of the seas.

At the trial, before Lord *Tenterden* at *Guildhall*, at the Sittings after *Hilary Term*, 1828, it was agreed that the facts should be turned into a special verdict, the material parts of which are as follow, *viz.*—"That the policy of assurance in the declaration mentioned was duly effected by one *John M'Allan*, as agent to the plaintiffs below, and was subscribed by the defendant below,

for the sum of 300*l.*, in manner and form as in the declaration mentioned. That the interest intended to be insured by the policy was duly declared to the defendant below, to be all in the *Java Packet*, on coffee; and that the ship being at *Batavia*, a certain quantity of coffee, of the value of 923*l.* 8*s.* 6*d.*, and no more, was there loaded in and on board of the said ship or vessel, by the plaintiffs below, with the intention that the said coffee should be carried to *Antwerp*; and that *Batavia* is a port in the island of *Java*, one of the islands in the *East Indies*. That the said ship, having taken in the coffee at *Batavia*, proceeded from thence, in the prosecution of the adventure, with the same coffee on board, to *Sourabaya*, which is another port in the island of *Java*; and that the plaintiffs below there loaded a certain other quantity of coffee, of the value of 5368*l.* 16*s.* 6*d.*, on board the said ship, with the intention that the same should be carried in her to *Antwerp*, making the whole value of the coffee loaded by the plaintiffs below 6292*l.* 5*s.* That the ship, in the course of the adventure, returned from *Sourabaya* to *Batavia*, with the said coffee so shipped on board her at *Batavia* and *Sourabaya*, as aforesaid; and that she afterwards sailed therewith from *Batavia* for *Antwerp*. That *Sourabaya*, to which place the ship proceeded from *Batavia*, and where she took in coffee as aforesaid, is not in the direct course from *Batavia*, *Sincapore*, *Penang*, or *Malacca*, to *Europe*, nor in the direct course from any of those four places, *Sincapore*, *Penang*, *Malacca*, or *Batavia* to any other of those four places; but that the said port of *Sourabaya* is directly out of the course from each of the said four places to *Europe*, and from each of the said four places to any other of them, and is distant from *Batavia* four hundred miles eastward; and that *Sincapore*, *Penang*, *Malacca*, and *Batavia* are not, according to the order in which the said four places are mentioned in the policy, in the direct course of a voyage therefrom to *Europe*; but that the direct course of a voyage from the said four

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places to *Europe* is according to the following order, *vis. Penang, Malacca, Sincapore, Batavia*;—and that any port or place in *Persia* is more than one thousand miles out of the course from any one of the said four places to *Europe*. It was also found, that the whole of the coffee was the property of the plaintiffs below, and that they were interested therein as in the declaration mentioned; and that the ship, whilst she was proceeding from *Batavia* towards *Antwerp*, in the said voyage, with the coffee on board, and before her arrival at the port of *Antwerp*, was wholly lost by perils of the seas.

The Court of *King's Bench* having given judgment for the plaintiffs below, for the amount of the loss on the coffee shipped both at *Batavia* and *Sourabaya* (a), the cause was afterwards removed, by a writ of error, into the Court of *Exchequer Chamber*, and the questions for the opinion of that Court were, whether the voyage performed was a voyage covered by the policy, or whether the passage to *Sourabaya* was not a deviation;—and also, whether the coffee shipped at *Batavia* and *Sourabaya*, or at the latter place, was covered by the policy?

The case came on for argument on a former day in this Term.

Mr. *Maule*, for the plaintiff in error (defendant below).—*First*, the voyage was misdescribed in the policy.—*Secondly*, the sailing from *Batavia* to *Sourabaya*, and back to *Batavia*, was a deviation.—And, *lastly*, the coffee shipped at *Sourabaya* was not covered by the insurance, as it was not a loading place or port within the terms or meaning of the policy. *First*, the ship did not sail on the voyage insured, or upon that described in the declaration; and, as she sailed on a different voyage, the underwriters are not liable, but are wholly discharged from the policy,

(a) See 10 Barn. & Cress. 858.

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on the ground of a deviation. The insurance was effected on goods by four named ships, at and from four ports or places, which were also specified by name in the policy; and when the ship sailed from *Batavia* to *Sourabaya*, after the commencement of the risk, and then sailed back to *Batavia*, she did not sail on a voyage within either of the licences contained in the policy. The words of the first clause, *viz.*—"Touch, stay, and trade at all or any ports whatsoever in the *East Indies*," can only apply to such ports as the vessel might touch at in the usual course of a voyage, from one or other of the four places designated in the policy, to *Europe*. And although the second clause contains ample and extensive words, *viz.*—"That it should be lawful for the ship, in that voyage, to proceed and sail to, and touch and stay at, any ports or places whatsoever, and wheresoever, in any direction, and for any purpose," yet the generality of the licence must be restrained, it being confined to ports or places *in that voyage*. The words "stay and trade," in the first clause, do not enlarge the course of the voyage, or of themselves imply that the ship might go any where; and although the word "touch" may be said to have a more ample or extended signification, yet it would not warrant the ship's going directly from *Batavia* to *Sourabaya*, which was four hundred miles distant and out of her regular course. Although, in *Metcalfe v. Parry (a)*, under a policy on ship at and from *Antigua* to *England*, with liberty to touch at all or any of the *West India* Islands, *Jamaica* included:—it was held that the ship might touch at any of the *West India* Islands, although not in the direct course from *Antigua* to *England*, and stay at such as she visited the time necessary to complete her homeward cargo; yet there, there was a liberty to touch at *all or any* of the *West India* Islands, which shewed that those islands might be taken without

(a) 4 Camp. 123.

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any regard to their geographical order, and that the ship might proceed, if necessary, from island to island, for the purpose of procuring freight; and, although she went to *St. Kitt's*, it was a *West India* island, and within the terms of the policy. Here, however, although the ship might sail to, and touch and stay at any ports or places whatsoever and wheresoever, in any direction, and for any purpose, yet the words, "*particularly Sincapore, Penang, Malacca, and Batavia, &c., &c.,*" immediately followed, and all the ports or places at which the ship might touch were restricted to the particular voyage; but if they are to be taken in an unrestrained or unlimited sense, the vessel might have proceeded from *Batavia* to *Canton*, or to any other place the master might have thought proper, although the voyage insured was from *Batavia* to *Europe*. In *Hogg v. Horner* (a), where a ship was insured "at and from *Lisbon* to a port in *England*, with liberty to call at any one port in *Portugal*, for any purpose whatever, and the ship had sailed from *Lisbon* to *Faro*, to complete her loading: *Faro* being a port to the southward of *Lisbon*, and consequently lying out of the course of the voyage to *England*, Lord *Kenyon* was of opinion, that the liberty given by the policy must be restrained to a permission to call at some port to the northward of *Lisbon*, in the course of the voyage to *England*; and that, by going to the southward, the assured had been guilty of a deviation. Here, although the words "in any direction" are introduced, yet it would be most inconvenient to give them a general and unlimited latitude; they must be restrained to the course of the voyage, or to ports or places adjacent to those specified in the policy. Although, in *Mellish v. Andrews* (b), on a policy on goods, at and from *London* to the ship's discharging port or ports in the *Baltic*, with liberty to touch at any port or ports for orders, or for any other purpose, and to touch and stay at any ports or places whatsoever and wheresoever:"—

(a) *Park on Insur.* 6th edit. 394.

(b) 2 *Mau. & Selw.* 27.

it was held, that the ship, having touched at *Carlshamn* for orders, and gone on to *Swinemunde*, a more distant port, for further orders, and having received orders at *Swinemunde*, because it was unsafe to land there, to return to *Carlshamn* and wait for orders, might so return to *Carlshamn* without being guilty of a deviation; yet it was found that she went to *Swinemunde* in the prosecution of her voyage; and Lord *Ellenborough* said—"That the contract was perfectly new in its form and object, and to which a rule of construction must be applied, not drawn from another state of things where a *terminus a quo* and *ad quem* are prescribed, and where going out of the prescribed course would certainly be a deviation."—Here, however, as the liberty was restrained to the vessel's sailing to, or touching at, any ports or places *in that voyage*, it must be limited accordingly; and the ship could only call at ports in the course or due prosecution of the voyage insured, *viz.* from *Singapore* to *Penang*, *Malacca*, or *Batavia*, to the port of discharge in *Great Britain*. In *Bottomley v. Bovill* (a), on a policy upon a ship at and from *London* to *New South Wales*, and at and from thence to all ports and places in the *East Indies* or *South America*; with liberty for the said ship, in that voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever, with leave to take in and discharge goods and passengers at all ports and places in the *Channel*, *Cork* in *Ireland*, *Madeira*, *Cape of Good Hope*, *St. Helena*, and wheresoever the ship might proceed to, as well on this as on the other sides of the *Capes of Good Hope* and *Horn*, and for all purposes whatsoever; particularly, to trade and sail backwards and forwards, and forwards and backwards;—it was held, that, after the arrival of the ship at *New South Wales*, she was protected by the policy, so long only as she was sailing on a voyage either to *South America* or to the *East Indies*, or on some interme-

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(a) 5 Barn. & Cress. 210; S. C. 7 Dow. & Ryl. 702.

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diate voyage, having for its ultimate object, the accomplishment of a voyage either to *South America* or to the *East Indies*; and Lord Chief Justice *Abbott* there said—"The words of the policy are, certainly, of very large and extensive import; but, large as they are, they must receive that construction which has been given to similar words in other cases; and, giving them that construction, we must hold, that, by this policy, the ship would be protected by the policy so long only as she was sailing on an intermediate voyage, undertaken with a view to the accomplishment of one or other of the voyages pointed out by the policy as the principal object in contemplation of the parties, *viz.* a voyage either to *South America* or the *East Indies*." And Mr. Justice *Bayley* said—"A liberty to touch, stay, and trade, at any ports or places whatsoever, has been held to be confined to a staying or trading at any port for a purpose subordinate to the voyage insured, which is the principal object of the policy. I think the liberty to sail backwards and forwards, and forwards and backwards, must be construed so as to protect the ship, so long only as she was sailing on a voyage, having for its ultimate object the accomplishment of the principal voyage insured." But here the ship did not sail on an intermediate voyage for the purposes of the general voyage, for she sailed from *Batavia* to *Sourabaya* in the first instance, which was quite out of the course of the voyage, and returned back to *Batavia* before she proceeded to *Antwerp*. But, at all events, the coffee which was put on board at *Sourabaya* is not protected by the insurance, as it was not a loading port or place within the terms of the policy. Although a ship may be justified in going from port to port, the master will not be warranted in loading goods at all or any of such ports. In *Grant v. Paxton* (a), and *Grant v. Delacour* (b), a distinction was taken between a

(a) 1 Taunt. 463.

(b) 1 Taunt. 465-6.

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policy upon a homeward voyage, and a voyage out and home, in relation to the loading of the cargo. In the former case, the policy was held to attach only on the particular cargo taken in at the first port of loading, but, in the latter it was held, that, by necessary implication, the policy applied to all goods put on board in the course of the voyage. In that case, however, the additional words *forwards and backwards at sea*, were introduced in the policy, which gave it a more extensive signification. Although, in *Violett v. Allnutt (a)*, a policy at and from *Plymouth to Malta*, with liberty to touch at *Pensance*, or any port in the *Channel* to the westward, for any purpose whatever, upon goods by the ship *Lion*, beginning the adventure from the loading thereof on board the said ship as above, was held to include a liberty to touch at *Pensance*, for the purpose of taking a further cargo on board; and that goods loaded there were protected by the policy; yet that cannot be considered as a solemn adjudication or decision, as the objection was raised on a motion for a new trial, and the Court expressed no opinion upon the point. Although that case was recognised by Lord *Ellenborough* in *Barclay v. Stirling (b)*, who said, that it shewed that an intermediate port might be included within the policy, equally with the *terminus a quo* mentioned in it; yet, in *Barclay v. Stirling*, the insurance was *on freight*, which the policy would have covered had it remained at the risk of the assured. There, a policy on freight, at and from the ship's port of loading in *Jamaica* to her port of discharge, with leave to call at intermediate ports, beginning the adventure on the goods from the loading as aforesaid, with leave to discharge, exchange, and take on board goods at any port she might call at, without being deemed a deviation;—was held to cover the freight of goods loaded at an intermediate port:—therefore, where the ship, having sailed with a cargo loaded at

(a) 3 Taunt. 419.

(b) 5 Mau. & Selw. 11.

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Jamaica, was, during the voyage, cast on shore at an intermediate port, and lost part of her cargo, and took other goods on board at that port, in order to complete her cargo, and arrived at her port of discharge, and earned freight; it was most properly decided, that the assured, who had abandoned to the underwriter upon intelligence of the loss, and had adjusted with him as for a total loss, was liable to the underwriter for the freight of that part of the cargo loaded at the intermediate port, after deducting the expenses attendant upon procuring the said freight, according to the principle established in *Sharp v. Gladstone* (a).

Mr. *Joshua Evans*, *contra*, was requested by the Court to confine his argument to the last point. The case of *Violett v. Allnutt*, which was recognised and adopted as an authority in *Barclay v. Stirling*, is precisely in point to shew, that the coffee loaded at *Sourabaya* is protected by the policy. The true principle was established in the latter case, and it is immaterial whether the insurance were on freight or on goods; and here the underwriters agreed to indemnify the assured against any loss which might arise in the course of a trading voyage, and to protect goods at whatever port they might be loaded in the course of that voyage. In *Barclay v. Stirling*, Mr. Justice *Holroyd* said (b)—“This is a policy not confined to freight on goods loaded at *Jamaica*; but is to be extended to goods loaded during the voyage from *Jamaica* to her ports of discharge. The leave to call at other ports, and load there, puts the freight arising from the goods loaded at the *Havannah*, upon the footing with the former freight, and brings it within the meaning of the policy.” And Lord *Ellenborough* said—“That *Violett v. Allnutt* shews that an intermediate port may be included within the policy, equally with the *terminus a quo*; and that it is very material that it should be so.” The rule as to the construction to be put on

(a) 7 East, 24.

(b) 5 Mau. & Selw. 14.

policies of assurance was most accurately laid down by Lord *Ellenborough* in *Robertson v. French* (a), viz. that they are to be construed according to their sense and meaning, as collected, in the first place, from the terms used in them, which terms are themselves to be understood in their plain, ordinary, and popular sense, unless they have generally, in respect to the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense, as, for instance, (said his Lordship) (b), where the word *ship* is written in the margin of the policy, or *freight*, or *goods*; in such case, the general terms of the policy applicable to other subjects besides the particular one mentioned in the margin, are thereby considered as narrowed in point of construction to that one. And this is done in cases where the subject meant to be insured is still more remote from "ship and goods," the only subjects of insurance in the printed policy, viz. where the object of the insurance, as declared by the marginal memorandum, is, money lent on bottomry, or *respondentia*, or the like: the meaning of which marginal memorandum may be translated thus:—"We mean to insure the subject so named *freight* for instance, arising and accruing, during the limits of the voyage within described, from the carriage of goods on board the ship within mentioned, against the perils within enumerated, and upon the premium herein specified. In other words, we adopt the general language of the policy, as far as it may serve to effectuate this object, and no further."—Here the second clause in the policy is not confined to touching and staying at any ports, but the most comprehensive words are introduced, viz. "with leave to

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(a) 4 East, 135.

(b) Ib. 140.

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take on board, discharge, reload, or exchange goods," and it was the intention of the parties at the time the insurance was effected, that this should be a trading voyage; and the coffee shipped on board at *Sourabaya*, was protected by the policy, as it might be considered as an intermediate port on the authority of the cases of *Violett v. Allnutt*, and *Barclay v. Stirling*.

Mr. *Maule*, in reply.—'The case of *Barclay v. Stirling* is altogether distinguishable from that of *Violett v. Allnutt*, as, in the former case, the insurance was on freight, and the judgment of the Court proceeded upon that ground; for, as Mr. Justice *Bayley* said (a)—"In principle and good sense, there can be no reason why this policy, which was intended to cover the freight upon the whole voyage, should not attach upon the freight of goods loaded at an intermediate port in the voyage." That, however, cannot apply to a policy on goods, and the beginning the adventure upon goods, from the loading thereof on board the ship *as above*, can only apply to a loading at one of the four places specified in the policy. If the vessel had sailed from *Batavia* to *Europe*, she might, perhaps, having commenced her voyage, have gone to the ports at which she had leave to touch; but as she went directly out of her course in the first instance, *viz.* from *Batavia* to *Sourabaya*, and returned to *Batavia* before she sailed for *Antwerp*, the coffee shipped at *Sourabaya* was not protected by the insurance, as it was not a loading port or place within the terms or meaning of the policy.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court as follows:—

In this case, in which judgment has been given for the plaintiffs in the original action, it appears to be unnecessa-

(a) 5 Mau. & Selw. 13.

ry to recapitulate the declaration, or the facts found by the special verdict: it will be sufficient to make such reference to them as will be necessary to explain the grounds of the judgment now given by the Court.

The writ of error was brought by the defendant below, and the objections which have been taken to the judgment of the Court of *King's Bench*, and which are relied upon in argument by the counsel for the plaintiff in error, were in substance these three, *viz.*—*First*, that the ship never sailed on the voyage described in the declaration; or, in other words, there was a misdescription of the voyage.—*Secondly*, that, upon the facts stated in the special verdict, the sailing from *Batavia* to *Sourabaya* and back, was a deviation.—And, *thirdly*, that, at all events, the goods shipped at *Sourabaya* are not covered by the policy.

The first objection urged is, that the voyage for which the ship was insured was a voyage from *Sincapore*, *Penang*, *Malacca*, and *Batavia*, all or any, to the ship's port or ports of discharge in *Great Britain*, or to any port or ports in the *United Netherlands*, or to *Altona* or *Hamburgh*; that the ship sailed with part of her cargo on board from *Batavia* to *Sourabaya*, a port four hundred miles to the eastward, where she loaded other part of her cargo, and then returned to *Batavia*, and thence set sail to *Antwerp*; that this was not the voyage insured; and that, the ship sailing on a different voyage from that described in the policy, the underwriters are altogether discharged.

In order to ascertain the validity of this objection, it will be necessary to advert to the terms in which the voyage itself is described in the policy, and the leaves or licences for which the assured has stipulated; and also to advert to those facts stated in the special verdict, which bear upon this part of the question. Now, the voyage is described in the policy—"at and from *Sincapore*, *Penang*, *Malacca*, and *Batavia*, all or any, to the ship's port or ports of discharge in *Great Britain*, or to any port or ports in the *United Netherlands*, or to *Altona* or *Hamburgh*, all or any,

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with leave to touch, stay, and trade at all or any ports or places whatsoever and wheresoever in the *East Indies*, *Persia*, or elsewhere, as well beyond as at and on this side of the Cape of *Good Hope*, in port or at sea, at all times and in all places, and until safely arrived and landed at the ship's final port or place of discharge." The adventure is then declared by the policy to be on goods "in the good ship or vessel called the *Albion*, *Bolivar*, *Java Packet*, and *Blora*, all or any;" and the commencement of the adventure is then stated to be—"upon the said goods and merchandizes, from the loading thereof on board the said ships as above." After this is inserted, a second or further clause of leave or licence, in these terms—"And it should be lawful for the said ship, &c., in that voyage, to proceed and sail to, and touch and stay at, any ports or places whatsoever and wheresoever, in any direction, and for any purpose, necessary or otherwise, particularly, *Singapore*, *Penang*, *Malacca*, *Batavia*, the Cape of *Good Hope*, and *St. Helena*, with leave to take on board, discharge, reload, or exchange goods or passengers, without being deemed any deviation from, and without prejudice to, the assurance." This policy was afterwards declared to be—"all in the *Java Packet*, in coffee."

Now, looking at the terms in which this policy is effected, and construing it in the plain, ordinary, and proper sense in which these terms are to be understood, there being no peculiar sense, so far as we are aware, which the words have acquired, distinct from their popular sense, we think the voyage in question is a voyage intended by the parties to be, and is in fact, covered by, the description of the voyage contained in the policy.

The voyage performed by the ship is described in the special verdict thus—"That the ship, being at *Batavia*, a certain quantity of coffee, of the value, &c., was there loaded in and on board the said ship or vessel by the assured, with the intention that the said coffee should be carried in the said ship to *Antwerp*; and that *Batavia* is

a port in the island of *Java*, one of the islands in the *East Indies*; and that the said ship, having taken in the said coffee at *Batavia*, in the prosecution of the adventure, proceeded from thence, with the same coffee on board her, to *Sourabaya*, which is another port in the island of *Java*; and that the assured there loaded a certain other quantity of coffee, of the value, &c., on board the said ship, with the intention that the same should be carried in the said ship to *Antwerp* aforesaid." The special verdict afterwards states—"That the said ship, in the course of the adventure, returned from the said port of *Sourabaya* to the said port of *Batavia*, with the said coffee so shipped on board her at *Batavia* and at *Sourabaya* as aforesaid; that the said ship afterwards sailed therewith from the port of *Batavia* for *Antwerp* aforesaid; and that *Sourabaya*, to which place the said ship proceeded from *Batavia*, and where she took in coffee as aforesaid, is not in the direct course from *Batavia*, *Sincapore*, *Penang*, or *Malacca*, to *Europe*; nor in the direct course from any one of those places, *Sincapore*, *Penang*, *Malacca*, or *Batavia*, to any other of those four places; but the said port of *Sourabaya* is directly out of the course from each of the said four places to *Europe*, and from each of the said four places to any other of them, and is distant from *Batavia* four hundred miles eastward; and that *Sincapore*, *Penang*, *Malacca*, and *Batavia*, are not, according to the order in which the said four places are mentioned in the policy, in the said course of a voyage therefrom to *Europe*; but that the direct course of a voyage from the said four places to *Europe*, is according to the following order, *viz.* *Penang*, *Malacca*, *Sincapore*, *Batavia*; and that any port or place in *Persia* is more than one thousand miles out of the course from any of the said four places to *Europe*.

The underwriter contends, that, when the ship sailed from *Batavia*, after the risk had commenced, to *Sourabaya*, to take in a further cargo, and then sailed back to

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Batavia, she sailed on a voyage not within the policy, or within either of the leaves or licences contained therein. But, independent of the large and general words used in the description of the voyage, and the very extended powers given by the policy, the situation of the assured, and the circumstances under which it was effected, as they must be inferred from the policy itself, make it probable, that a contract of the most open and comprehensive kind was intended to be effected. This was an insurance on goods, not on ships. At the time the policy was effected, the assured was uncertain from what port or ports of the *East Indies* or *Persia* his cargo would be shipped by his agents; whether all at one place, or part at one, and part at another. He was further uncertain by what ship or ships, out of four which are named in the policy, his cargo would be carried; or from what port or ports, out of four that are enumerated, such ship or ships would sail. He could not foresee into what ports or places, or for what purposes, the owners of the ships might send them; neither could he control such directions: and therefore he frames a description of the voyage in such comprehensive terms as may comprise a loading of the cargo either at one port, or at various ports and places in the *East Indies*; and powers and licences are also inserted in the policy, so as to meet almost every possible contingency of the destination or employment of the ship, without endangering his right to recover for a loss upon the goods, either on the ground of misdescription of the voyage, or of any deviation. And, looking at the policy with this view, we think the words of the instrument are large enough to carry such intention into effect, and that the sailing from *Batavia* with part of the cargo to *Sourabaya*, and taking in other part of the cargo there, and then returning from *Sourabaya*, by the way of *Batavia*, to *Europe*, was a voyage within the contemplation of, and protected by the policy.

It is argued, on the part of the underwriter, that, if the

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clause first inserted is taken alone, the meaning of the words, "touch, stay, and trade at all or any ports whatsoever in the *East Indies*," can only mean such ports and places as the ship may touch at in the usual course of a voyage from one or other of the four enumerated places to *Europe*; that the leave to stay and trade, implies that the ship is lawfully at the place where such trading and staying is to take place, that is, some port or place in the course of the voyage. But, that this cannot be the meaning of the present policy, appears clear from the remainder of the clause, *viz.* "any ports or places whatsoever in the *East Indies*, *Persia*, or elsewhere." Now, as the special verdict has found expressly that any port or place in *Persia* is more than one thousand miles out of the course from any of the said places to *Europe*, it follows that the trading cannot be intended to be confined to such ports or places only as the ship touches at in the course of such a voyage: in the same manner as in the case of *Metcalfe v. Parry (a)*, where the clause was—"with liberty to touch at all or any of the *West India* Islands, *Jamaica* included"—it was held, that the insertion of *Jamaica*, which was five hundred miles out of the usual course, shewed the intention to be, that the ship might stop at any of the islands, though out of the course of the usual voyage.

Again, taking up the question on the second clause of licence, the words used are, taken altogether, of a meaning equally general with those in the first, *viz.* "it should be lawful for the said ship, in that voyage, to proceed and sail to, and touch and stay at, any ports or places whatsoever and wheresoever, *in any direction, or for any purpose.*" It is contended, that the generality of this licence is restrained by the words, "in that voyage;" but, upon that construction, what sense can be given to the words, "in any direction?"—Words that are irreconcilable with touch-

(a) 4 Camp. 123.

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ing for the purpose of trade in the onward course of the voyage only. And the insertion of those words in this policy distinguish the case from that of *Hogg v. Horner*, which was cited on the part of the plaintiff in error.

Upon the whole, therefore, we think, the shipping part of the cargo at *Batavia*, and thence proceeding to *Sourabaya*, and shipping other part of the cargo there, and thence sailing back to *Batavia*, and thence with the cargo to *Antwerp*, was a trading voyage from *Batavia* to *Antwerp* by the way of *Sourabaya*, within the intention of the parties as expressed in the policy, and the two several clauses of licence contained therein.

Having, therefore, fully considered this, the first objection, it becomes scarcely necessary to do more than to advert to the two which remain; for, if the sailing from *Batavia* to *Sourabaya*, and back to *Batavia*, and thence to *Europe*, is a voyage described in the policy, it follows immediately that it cannot be treated as a deviation. Indeed, as one of the places to which the ship might go upon the voyage, is a port in *Persia*, and as the special verdict does not find that *Sourabaya* is out of the course to *Persia*, we should be justified, upon this more restrained ground, in not considering this as a deviation from the voyage insured.

As to the third point, that the goods loaded at *Sourabaya* are not covered by the policy, the question is, whether *Sourabaya* is a loading port within the meaning of the policy? Besides referring to the opinion we have already expressed on the first objection, which also involves this question, we think the two cases of *Violett v. Allnutt* (a) and *Barclay v. Stirling* (b) go the full length of establishing, that, under the usual clause in a policy, "with liberty to touch at a port for any purpose whatever," is included a liberty to touch for the purpose of taking on board part

(a) 3 Taunt. 419.

(b) 5 Mau. & Selw. 6.

of the cargo covered by the policy, after the policy had attached on part taken in at the loading port; and in this case the leave is not confined to touching and staying, but extends expressly to taking on board, discharging, re-loading, and exchanging goods.

Upon the whole, therefore, we think the plaintiff below entitled to recover the loss upon the whole of the cargo, both that loaded at *Batavia*, and that loaded at *Sourabaya*; and, therefore, that the judgment given by the Court of *King's Bench* should be affirmed.

Judgment affirmed.



SOLARTE and Others, Assignees of ALZEDO, a Bankrupt,
v. PALMER and Another.

[*In error.*]

THIS was an action by the plaintiffs, as holders, against the defendants, as indorsers of a bill of exchange. The first count of the declaration stated, that, on the 12th of April, 1825, one *Joseph Keats* made his bill of exchange in writing, and directed the same to Messrs. *Daniel Jones & Co.*, and thereby required them, eight months after the date thereof, to pay to his, *Keats'*, order, the sum of 683*l.*; that Messrs. *Jones & Co.* accepted the bill, payable at Messrs. *Williams, Burgess, & Co.*, Bankers, *London*; that *Keats* indorsed the bill to the defendants, who indorsed it to *Alzedo*, the bankrupt. The plaintiffs then averred, that Messrs. *Jones & Co.* refused to pay the bill on its being

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The notice of dishonour of a bill of exchange, should at least inform the party to whom it is addressed, either in express terms, or by necessary implication, that the bill has been dishonoured, and that the holder looks to him for payment of the amount. Where, therefore, the attorney of the holder of a bill, the day after it had been dis-

honoured by the acceptor, sent a letter to the indorser, stating that a bill for 683*l.*, drawn by *J. K.* upon Messrs. *D., J., & Co.*, bearing the indorsement of the person to whom the letter was addressed, had been put into the hands of the attorney by the holder, with directions to take legal measures for the recovery thereof, unless immediately paid to the attorney:—*Held*, not to be a sufficient notice of the dishonour, to enable the holder to recover against the indorser in an action upon the bill.

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duly presented to them for that purpose, whereof *the defendants had notice*. Plea—The general issue.

At the trial, before Lord *Tenterden*, at *Guildhall*, at the Sittings after *Hilary* Term, 1828, the defendants admitted that *Alsedo* had become bankrupt, and that the plaintiffs had been duly appointed his assignees. The hand-writing of the drawer, the acceptor, and indorsers was also admitted. The plaintiffs then proved, that the bill was duly presented to Messrs. *Jones & Co.*, the acceptors, for payment on the 15th *December*, 1825, the day on which it became payable; that payment was refused by them, and that the bill was returned to the plaintiffs for non-payment on the 16th; that, on the 17th, the plaintiffs requested their attorneys to write to the defendants, which they did. The letter was as follows:—

“ *London*, 17th *December*, 1825.

“ Gentlemen,—A bill for 683*l.*, drawn by Mr. *Joseph Keats* upon Messrs. *Daniel Jones & Co.*, and bearing your indorsement, has been put into our hands by the assignees of Mr. *J. R. de Alsedo*, with directions to take legal measures for the recovery thereof, unless immediately paid to—Gentlemen, your very obedient servants,

J. & S. Pearce.”

Addressed to
 Messrs. *Palmer & Bouch.*”

It was also proved, that this letter was, on the said 17th day of *December*, by the directions, and on the behalf of the plaintiffs, sent to and received by the defendants. Lord *Tenterden* told the Jury, that he was of opinion that this letter was not a sufficient notice of the dishonour and non-payment of the bill, to entitle the plaintiffs to maintain the action against the defendants; and that, upon the evidence, the Jury ought to find a verdict for the defendants; and with that direction he left the same to the Ju-

ry. Upon which, the plaintiffs' counsel tendered a bill of exceptions on their behalf; but the Jury, acting upon the opinion of his Lordship, gave their verdict for the defendants; and judgment having been entered up accordingly, and the bill of exceptions sealed by his Lordship, a writ of error was afterwards brought in the Court of *Exchequer Chamber*; and the question for the determination of that Court was, whether the above letter was sufficient notice to the defendants, of the dishonour of the bill of exchange by *Jones & Co.*, the acceptors.

The case came on for argument on a former day in this term.

Mr. *R. V. Richards*, for the plaintiffs.—The object of the notice of the dishonour of a bill of exchange is, to put parties who are collaterally liable upon their guard, and also to inform them that the holder looks to them for payment. No particular or precise form of words is necessary in such a notice. Although, in *Tindal v. Brown*, Mr. Justice *Ashhurst* said (a)—“Notice means something more than *knowledge*; because it is competent to the holder to give credit to the maker;” yet Mr. Justice *Buller* there said (b)—“The purpose of giving notice is not merely that the indorser should know the note is not paid, for he is chargeable only in a secondary degree; but, to render him liable, you must shew that the holder looked to him for payment, and gave him notice that he did so. Though there is no prescribed form of this kind of notice, yet it must import that the holder considers the indorser as liable, and expects payment from him, that he may have his remedy over by an early application: then it becomes his business to take up the note.” Applying that principle to the present case, no person can entertain a doubt but that the holders of the bill meant to look to the defend-

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(a) 1 Term Rep. 169.

(b) Id. 170.

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ants, as the indorsers, for payment, and they in fact gave them notice that they did so. The plaintiffs' attorneys stated in their letter, that they were directed to take legal measures for the recovery of a bill for 683*l*. drawn by *Keats* upon *Jones & Co.*, and bearing the defendants' indorsement; and it is quite clear that, if they had added that the bill had been dishonoured by *Jones & Co.*, the notice would have been amply sufficient. In Mr. Justice *Bayley's Treatise on Bills of Exchange* (a), it is said—"The notice must come from the holder, or some party entitled to call for payment or reimbursement; and though there is no prescribed form for it, it ought to import that the person to whom it is given is considered liable, and that payment from him is expected;" and the case of *Tindal v. Brown* is referred to as an authority in support of that position. In *Chitty on Bills* (b), it is said, that notice of non-payment to the drawer and indorsers must come from the holder, and must import that he intends to stand on his legal rights, and to resort to them for payment; and here, as the plaintiffs' attorneys stated that they had directions to take legal measures for the recovery of the bill, unless immediately paid to them, it was sufficient to apprize the defendants that they were looked to for payment; and that is all that can be required; and a commercial man would no doubt consider this as a sufficient notice of the *dishonour* of the bill: and even if that word had been introduced, it would not have been sufficient in law, without further stating that it had been dishonoured by the acceptors, who were the parties primarily liable; for, in *Hartley v. Case* (c), it was held, that the notice of the dishonour of a bill must contain an intimation that payment of the bill has been refused by the acceptor, and, therefore, that a letter merely containing a demand of payment, is not a sufficient notice;

(a) 4th Edit. 206.

(b) 5th Edit. 292.

(c) 4 Barn. & Cress. 339; S. C. 6 Dow. & Ryl. 505.

yet that case is mainly distinguishable from the present, as there the plaintiff, as indorsee, in his letter to the defendant, as the drawer of the bill, merely stated, that he was desired to apply to the defendant for the payment of 150*l.* due to the plaintiff on a draft drawn by Mr. *Case* on Mr. *Case*, without even stating that it had been indorsed to the plaintiff, or that he was the holder, or that the bill had been dishonoured; and, as Lord Chief Justice *Abbott* said—"It does not even say that the bill was ever accepted." Here, however, the defendants had notice of the names of the drawer and drawees, and that legal measures would be taken for the recovery of the bill, unless it were immediately paid. The demand of payment is a sufficient notice of the dishonour of the bill, particularly against the defendants, when coupled with a threat, that the holders would take immediate legal steps for its recovery.

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Mr. *Whateley, contra.*—It is a matter of great importance that notice of the dishonour of a bill by the holder to the drawer or indorsers should be clear and intelligible upon the face of it. It ought to convey information not only what the bill is, but that it has been refused payment by the acceptor, and that the holder looks to the party applied to for payment, on the ground that the bill had been dishonoured. The plaintiffs have averred in their declaration, that Messrs. *Jones & Co.* accepted the bill, and that they refused to pay it on its being presented to them for that purpose, of which *the defendants had notice*. The notice, therefore, should at least have imported that the bill had been dishonoured; and if, instead of the usual and general averment of notice, the letter in question had been set out on the record, it would not have been sufficient, as it does not even state that the bill had been accepted. It is not necessary to dispute the authority of the case of *Tindal v. Brown*, as that of *Hartley v. Case* is precisely in point. There, the notice was far more explicit than in the

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present case, as it stated that the draft or bill was *due* to the plaintiff himself, and a direct application was made to the defendant for the amount of the bill, and that if it were not discharged on the receipt of the plaintiff's letter, law proceedings would immediately take place: and Lord Chief Justice *Abbott* said—"There is no precise form of words necessary to be used in giving notice of the dishonour of a bill of exchange; but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor." That is a safe and intelligible rule to act upon; and here, as the attorney's letter did not convey any notice to the defendants, that the bill had been accepted or dishonoured, or even that it was due, the ruling of Lord *Tenterden* at *Nisi Prius* was not only correct, but expressly sanctioned by the authority of *Hartley v. Case*.

Mr. *Richards*, in reply.—The case of *Tindal v. Brown* is an authority to shew, that if the holder of a bill give notice to the party whom he considers responsible, that he looks to him for payment, it is sufficient; and here the letter by the plaintiffs' attorneys to the defendants, not only stated the amount of the bill, and the names of the drawer and drawees, but that the defendants were the indorsers; and that, unless the bill were immediately paid to the plaintiffs' attorneys, they were directed to take legal measures for the recovery thereof. The intention of the writers of the letter is manifest; and this case is distinguishable from that of *Hartley v. Case*, as there the names of the drawer and drawee were the same, and the letter did not give the defendant any notice that a bill drawn by him had been dishonoured, for it merely contained a demand of 150*l.* due to the plaintiff on a draft drawn by Mr. *Case* on Mr. *Case*.

[Lord Chief Justice *Tindal*.—It is most important that there should be a general rule on this subject.]

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court, as follows:—

The question in this case is, whether the direction of Lord *Tenterden* to the Jury—"that the letter given in evidence at the trial, and set out upon the bill of exceptions, was not sufficient notice of the dishonour and non-payment of the bill, and that, upon such evidence, the Jury ought to find a verdict for the defendants"—was a proper direction or not? And we are of opinion, that the direction was proper, and that the judgment which has been given for the defendants must be affirmed.

The notice of dishonour, which is commonly substituted in this country in the place of a formal protest, such formal protest being essential in other countries to enable the plaintiff to recover (*a*), most certainly does not require all the precision and formality which accompanied the regular protest, for which it has been substituted. But it should at least inform the party to whom it is addressed, either in express terms, or by necessary implication, that the bill has been dishonoured, and that the holder looks to him for payment of the amount.

Here, the allegation in the declaration is, that the bill has been presented to the acceptor, who has refused payment, whereof the defendant has had notice; and, consequently, to satisfy this allegation, though no express form of words is necessary, the notice should convey an intimation to the party to whom it is addressed, that the bill is in fact dishonoured. Now, looking at this notice, we think no such intimation is conveyed in terms, or is to be necessarily inferred from its contents. Besides, it is perfectly consistent with this notice, that the bill has never been presented at all, and that the plaintiffs mean to rely upon some legal excuse for its non-presentment. The present case is stronger against the sufficiency of the notice than that of

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(a) Pothier, *Traité du contrat de change*, Part 1, cap. 5, s. 2, art. 1, s. 5.

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Hartley v. Case (a), where there was at least an allegation that the bill *had become due*, which is not found here. This letter may not improbably have been written with a different intent than that of giving notice of the dishonour to the indorser, and may have been information that an action was about to be brought by the attorneys, taking for granted that the notice of the bill's dishonour had been given in the ordinary way, before the bill was put into their hands for the purpose of suing thereon. At all events, however intended, it appears to us not to amount to such notice. We think, therefore, that the judgment ought to be affirmed.

Judgment affirmed.

(a) 4 Barn. & Cress. 339; S. C. 6 Dow. & Ryl. 505.

REGULÆ GENERALES.

IT is ordered, that, in future, where any amendment in the declaration shall be made after a rule to plead shall have been entered, no new rule to plead shall be necessary, provided such amendment be made in the term, or the vacation succeeding the term, in or of which the rule to plead shall have been entered; and the defendant shall have two days, exclusive of the day on which the amendment shall be actually made, to alter his plea, or plead *de novo*, unless otherwise ordered by the Court, or the Judge granting leave for the amendment.

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WHEREAS, by the ancient course of this Court, the fee paid to the Prothonotaries for the entry of every declaration in a cause has hitherto been of right payable at the time of filing thereof:—And whereas it is expedient, that, for the future, the practice of this Court should be made conformable to that of the respective Courts of *King's Bench* and *Exchequer*, so far as regards the time of such payment:—It is therefore ordered, that, from and after the essoign day of next *Trinity* term, the fee due to the said Prothonotaries for such entry as aforesaid, may be paid at any time previously to entering the issue or passing the record in such cause;—or, in case there shall be no record, at any time previously to signing interlocutory or final judgment:—and further, that, in all cases where there shall be no judgment, the said fee shall be payable at the time of taxing costs, where the proceedings in any cause are stayed, or such cause is terminated by any rule of this Court, or order of a Judge.

N. C. TINDAL.

J. A. PARK.

S. GASELEE.

E. H. ALDERSON.

END OF EASTER TERM.

CASES

ARGUED AND DETERMINED

IN THE

Courts of Common Pleas

AND

Exchequer Chamber,

IN TRINITY TERM,

IN THE FIRST YEAR OF THE REIGN OF WILLIAM IV.



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IN the last *Easter* Term, *William Walton*, Esq., Attorney-General of the Duchy of *Lancaster*, was appointed one of his Majesty's counsel learned in the law; and during this Term, *William Fuller Boteler*, Esq., and *John Augustus Francis Simpkinson*, Esq., were appointed his Majesty's counsel; and they took their seats within the bar accordingly.

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THE following case was, by the direction of his Honour, the Master of the Rolls, submitted to the Judges of this Court for their opinion.

"*Dorothy Axford*, late of *Wood Street, Cheapside*, in the city of *London*, deceased, being seised in fee of certain freehold estates, duly made and published her last will and testament, bearing date the 12th *October*, 1770, and which was executed and attested as by law was required for passing freehold estates by devise; and by such will, the said *Dorothy Axford*, after bequeathing several pecuniary legacies, devised and bequeathed four messuages in *Wood Street* aforesaid, and two other messuages in *Great St. Helen's*, to *George Lowe*, his heirs and assigns, to and for the several uses, intents, and purposes thereafter limited, expressed, and declared of and concerning the same; that is to say, 'In trust that he the said *George Lowe*, his heirs and assigns, do and shall, by and out of the rents, issues, and profits out of the said premises, pay, or cause to be paid, unto *Alexander Croker*, son of *Isaac Croker*, of *Lambeth*, in case he shall be living at the time of my death, the sum of 10*l.* to buy mourning; and also the further sum of 1*l.* and 1*s.* of lawful money of *Great Britain*, weekly, and every week during his natural life; and also in trust that he the said *George Lowe*, his heirs and assigns, do and shall, by and out of the rents, issues, and profits of the said premises, pay or cause to be paid unto *Mary*

A testatrix devised six messuages to a trustee, his heirs and assigns, in trust, to pay several annuities out of the rents and profits, and after their decease to dispose of the rents and profits equally amongst the testatrix's goddaughter and three other females named in the will, for their sole and separate use; and in case any of them should die, leaving a daughter or daughters, the share or interest of her or them so dying should go to such daughters as they should be in seniority of age and priority of birth;—but, in case any of the first four named females should die without issue in the life-time of the annuitants, then the share or interest of her and them so dying should be paid, applied,

and disposed of to the use of several other females named in the will, in succession: all the rest and residue of the testatrix's estate she devised to her goddaughter, one of the first named four devisees:—*Held*, that the four female devisees took estates for life as tenants in common in the premises mentioned in the will; that their daughters also took estates for life in the shares of their respective parents, upon their deaths, and that the goddaughter of the testatrix took the remainder in fee in the whole of the premises devised.

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Smith, for and during the term of her natural life, one annuity or yearly sum of 10*l.* of lawful money of *Great Britain*, by equal quarterly payments. [Annuities of 10*l.* a-year were then respectively charged upon the premises, in favour of *Charlotte Sibbells*, *Ann Spence*, *Susannah West*, *Mary Hargrave*, and *Mary Manley*; and for *Mary Gibson* 5*l.* 5*s.* a-year;] in consideration whereof, I do expect and desire that the said *Mary Gibson* do take care of the cats belonging to me at the time of my decease; and, from and immediately after the decease of them the said *Alexander Croker*, *Mary Smith*, *Charlotte Sibbells*, *Ann Spence*, *Susannah West*, *Mary Hargrave*, *Mary Gibson*, and *Mary Manley*, then, in trust, that he the said *George Lowe*, his heirs and assigns, do and shall pay and apply and dispose of the rents, issues, and profits of the said messuages, or other tenements and premises, unto and equally amongst my goddaughter, *Ann Mary Darwin*, *Mary Lowe*, daughter of the said *George Lowe*, *Mary Voss*, daughter of *Mary Voss*, and *Jane Spence*, daughter of the before-mentioned *Mrs. Spence*; and I do hereby declare that the said several devises and bequests hereinbefore by me made to and to the use of the said *Ann Mary Darwin*, *Mary Lowe*, *Mary Voss*, and *Jane Spence*, respectively, are and shall be to and for her and their own sole and separate use and benefit, and in no ways liable to the debts, contracts, intermeddling or engagements of her or their present or any future husband or husbands she or they may hereafter happen to marry; and that her or their receipt and receipts alone, under her or their hands respectively, without her husband, notwithstanding her present or any future coverture, or whether she or they be sole or married, for any sum or sums of money due or payable to her under or in virtue of this my will, shall from time to time be good and sufficient discharges to the person or persons paying the same; and in case any of them

the said *Ann Mary Darwin*, *Mary Lowe*, *Mary Voss*, and *Mary Spence*, shall happen to depart this life, leaving a daughter or daughters, that then the share or interest of her or them so dying shall go to such daughters, as they shall be in seniority of age and priority of birth, the eldest of such daughters to be preferred and take before the younger: Provided always, that in case of any of them the said *Ann Mary Darwin*, *Mary Lowe*, *Mary Voss*, and *Jane Spence*, shall happen to depart this life without issue, in the life-time of the said *Mary Smith*, *Charlotte Sibbells*, *Ann Spence*, *Susannah West*, *Mary Hargrave*, and *Mary Gibson*, then I order that the share or interest of her and them so dying, be paid, applied, and disposed of to and to the use of *Mary Winsley*, daughter of Mrs. *Fontain*, *Mary Cherrington*, daughter of *John Cherrington*, *Susannah Speck*, daughter of *William* and *Mary Speck*, *Mary Groves*, daughter of *Richard Groves*, of *Wood Street*, watch-maker, and *Diana Fierce*, daughter of *John* and *Diana Fierce*, in succession, one after another, as they the said *Ann Mary Darwin*, *Mary Voss*, and *Jane Spence* shall happen to depart this life. And as for and concerning all the rest, residue, and remainder of my estates, of what nature or kind whatsoever, I give, devise, and bequeath the same unto my goddaughter, *Ann Mary Darwin*. And it is my will and mind, that my several messuages or tenements be let out on leases at the end of the several terms already granted, in manner they have hitherto been done by me. And I do hereby nominate and appoint the said *George Lowe* executor of this my will. Provided always, that, in case the said *George Lowe* shall happen to die in my life-time, then I do hereby revoke, annul, and make void the several devises and bequests before by me given and devised to him the said *George Lowe*, his heirs and assigns, and declare that the said *William Speck* and *Richard Groves*, and the survivor of them, and the heirs and as-

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signs of such survivor, do and shall stand seised and possessed of the several messuages or tenements and premises, to hold to them, their heirs and assigns, upon the trusts, and to and for the several uses, intents, and purposes hereinbefore limited to the said *George Lowe*, his heirs and assigns.'

"The said *Dorothy Axford* duly made and published a codicil to the said will, bearing date the 12th November, 1770, and which codicil was executed and attested as by law was required to pass freehold estates by devise; and by such codicil the said *Dorothy Axford* devised and bequeathed as follows:—

" 'Whereas I did make and publish my last will and testament, bearing date the 12th day of *October* last past; and whereas, in and by my said last will, after giving and disposing of such part of my estate and effects as therein mentioned, I gave and devised all the rest, residue, and remainder thereof unto *Ann Mary Darwin* therein named; now it is my will and mind, in case the said *Ann Mary Darwin* shall happen to die before she attains the age of twenty-one years, I do hereby give and bequeath unto *Mary Lowe* in my said will named, all such rest, residue, and remainder of my estates and effects, after payment of the several legacies and bequests hereby, and in and by my said will given and bequeathed.'

"The said *Dorothy Axford* died in *December*, 1770, seised of the estates mentioned in her last will, without having altered or revoked her said will in any manner affecting the said devises, except as the same was altered by the codicil, and leaving the said *George Lowe*, and also the said several annuitants mentioned in her will, her surviving. Afterwards, all the annuitants, that is to say, *Alexander Croker*, *Mary Smith*, *Charlotte Sibbells*, *Mrs. Spence*, *Susannah West*, *Mary Hargrave*, *Mary Gibson*, and *Mary Manley*, died, leaving the said testatrix's goddaughter,

Ann Mary Darwin, Mary Lowe, Mary Voss, and Jane Spence, them surviving. The said *Ann Mary Darwin, Mary Lowe, and Mary Voss* afterwards died, leaving each a daughter her surviving; and the said *Jane Spence* departed this life without issue, and, as it was alleged, without leaving any heir-at-law."

The questions for the opinion of the Court were—

"*First*, what estates passed by the said will of the testatrix, *Dorothy Axford*, to *Ann Mary Darwin, Mary Lowe, Mary Voss, and Jane Spence* respectively; taking the limitations to those persons as limitations of legal estates? And—

"*Secondly*, what estates passed by the said will to the daughters of *Ann Mary Darwin, Mary Lowe, and Mary Voss* respectively; taking the limitations to them as limitations of legal estates?"

The case came on for argument in the last term, *viz.* on the 20th *April*.

Mr. Serjeant *Wilde* for the plaintiff.—*Ann Mary Darwin*, (the goddaughter of the testatrix), *Mary Lowe, Mary Voss, and Jane Spence*, respectively took estates for life in the six messuages devised by the will, and the daughters of the three former also took estates for life in the shares of their mothers upon their respective deaths; and *Ann Mary Darwin* took the remainder in fee in the whole of the premises, under the residuary clause. Although it may be contended for the defendants that the four first-named devisees either took an estate in fee or an estate tail; yet it is evident, from other clauses in the will, that, where the testatrix intended to give a larger estate than an estate for life, she so expressed it; for instance, at the commencement of the will, the devise is to *George Lowe* (the trustee), *his heirs and assigns*. So, after the decease of the several annuitants, *Lowe, his heirs and assigns*, were to dispose of the rents and profits of the messuages to the four female devi-

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sees equally, and, in case of their marrying, their receipts were to be a sufficient discharge. Again, the proviso at the end of the will, in case of the death of *Lowe*, states that the testatrix had devised to him, *his heirs* and assigns. Where, therefore, she meant that an estate of inheritance should pass, she employed the necessary words for that purpose. No words of limitation are added to the devise to the four females, and it must be observed that the testatrix has most guardedly excluded males throughout the whole of the will. As, therefore, there is an entire absence of any words of limitation to the first four named females, and there are no other words from which the intention of the testatrix to give them an estate of inheritance can be collected, they only took an estate for life; and although there is a residuary devise to one of them, *viz.* *Ann Mary Darwin*, yet she was the goddaughter of the testatrix, whom she intended to make the particular object of her bounty, and who consequently took the remainder in the whole of the premises devised, in fee. The devise is to *Ann Mary Darwin, Mary Lowe, Mary Voss, and Jane Spencer*, and in case any of them should die, leaving a daughter or daughters, then the share of her or them so dying should go to such daughters, as they should be in seniority of age and priority of birth. It is quite clear that such daughters were to take the same shares and interest as their respective mothers died possessed of: besides, the daughters were to take *in succession*, which clearly shews that it was the intention of the testatrix that their mothers should only take an estate for life. The main object of the testatrix was, that females alone should derive any benefit from her will; which is altogether inconsistent with giving the first four takers an estate tail, as then the male issue would take in preference to the females. Although, in the limitation over, the word *issue* only is used, *viz.* "that in case any of the four females shall happen to die without *issue* in the life-time of the annuitants," yet it

must be taken to mean the issue before referred to, *viz.* the daughters, and may be read as if the word *such* had been introduced. In order to create an estate tail by implication, the devise over must be in default of an indefinite and general failure of issue. But it is evident that that was not contemplated by the testatrix; and it would totally defeat the general intent expressed throughout the whole of the will, if the four first named devisees were to take an estate tail. The limitation over was not to take place on the natural determination of an estate tail, as by dying without issue generally, but only in a particular event, *viz.* on the death of any of the four females without daughters, in the life-time of the annuitants; and the word '*issue*' can only mean *such issue*, *viz.* daughters, as they alone were to take in succession, according to seniority of age and priority of birth. In *Foster v. Lord Romney*(a), a testator devised an estate to trustees and their heirs, until his nephew *Thomas*, son of his brother *William*, should attain the age of twenty-one or die, and, on his attaining twenty-one, to the said *Thomas* for life, *sans* waste; and, after the determination of that estate, to the trustees during *Thomas's* life, to preserve contingent remainders; and, after the decease of *Thomas*, to all and every the son and sons of the body of *Thomas*, severally and successively, one after another, in priority of birth, &c.; and, for default of *such* issue, to the trustees, until another nephew should attain twenty-one, and then to him in the same manner; and, for default of *such* issue, to the testator's brother *Joseph* for life, *sans* waste, and after his death to his son *Joseph* and his heirs: and it was held, that the nephews and their sons only took estates for life respectively, for want of words of limitation, or other tantamount words; the words "for default of *such* issue," meaning for default of son or sons, &c. So here, if the word '*such*' had been

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(a) 11 East, 594.

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introduced, there can be no doubt but that it would have reference to the daughters of the four first named devisees; and as they took only an estate for life in the first instance, their daughters could not take a larger estate. The case of *Roe d. Kirby v. Holmes* (a) is an authority to shew, that, where a testator uses words of inheritance in some clauses of his will, and there is a total absence of them in others, the Court will imply that he understood the force of words of limitation: and here, if the testatrix had intended to give the four first-named female devisees more than an estate for life, she would have so expressed it; and as her evident meaning was, and which is apparent from the whole of the will, that her property should go to females, to the exclusion of males, and the daughters of the four first-named devisees were to take in succession, they and their mothers only took estates for life respectively, with a remainder to the goddaughter of the testatrix, in fee.

Mr Serjeant *Jones*, *contra*.—The four first-named devisees respectively took an estate tail by implication. Although they only took an estate for life under the first clause in the will, yet it is clear, from the whole of the instrument taken together, that the testatrix meant that they should take a larger estate; and the Court will not exclude their male issue, unless there be a clear and manifest intention to that effect, which does not appear upon the face of the will. Although the first limitation is to the daughter or daughters, according to seniority of age and priority of birth, it merely shews that the testatrix meant to prefer the female line, but it does not follow that she intended to exclude males altogether. Besides, the share or interest of the mothers was to go to their respective daughters; and no such interest could pass, unless the mothers took an estate tail. But, as the devise

(a) 2 Wils. 80.

over is in general terms, *viz.* if any of the four first-named devisees shall die *without issue*, in the life-time of the respective annuitants, it must be taken as a devise over upon a general failure of issue. If a daughter of one of the four first-mentioned devisees were to die in the life-time of the annuitants, leaving a daughter, such child would be entitled to take; which could not be the case, unless her grandmother took an estate tail. Although it has been contended, that the words "*dying without issue*," must be taken to mean without *such* issue, yet the Court will not insert that word, or read "*issue*" as *daughters*; neither could they reject the word "*such*," if it had been introduced. In *Foster v. Lord Romney*, Lord *Ellenborough* referred to the case of *Denne d. Briddon v. Page (a)*, where there was a devise to *S. N.* for life, remainder to trustees, to preserve contingent remainders, remainder to the first and other sons of *S. N.*, and the heirs male of his and their bodies; and, for default of *such* issue, to the use of all and every the daughter and daughters of the body of *T. N.*; and, for default of *such* issue, to the use of the right heirs of the said *T. N.* for ever. And Lord *Mansfield* said—"If, after the limitation to the daughters of *T. N.*, the words had been, 'and if they die *without issue*,' we would have implied an estate tail; but here the words are, 'for default of *such* issue,' which can only mean the issue mentioned before. The Court have no power to strike out the word *such*; and, if they did, what are they to supply it with—tail general, or tail male? That shews, there is no intention apparent on the will for the Court to go upon." Here, however, no intention is expressed by the testatrix to exclude the male issue of the first takers, although she has preferred the female; and if the Court cannot strike out the word '*such*,' *a fortiori*, they have no power to insert it.

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(a) 11 East, 603, n., MS. *Buller*, J.

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[Lord Chief Justice *Tindal*.—The true distinction is, that the Court may read a will as if the word *such* had been introduced, where the sense absolutely requires it, but they cannot reject that word when they find it inserted.]

In *Hay v. The Earl of Coventry* (a), where an estate was limited by will to *A.* for life, remainder to his first and other sons in tail male, remainder to the use of all and every the daughters, &c., as tenants in common; and, in default of *such* issue, to the use of the right heirs of the devisor, Lord *Kenyon* said—"It has been argued that we may presume an intention in the devisor, from other parts of the will, to give an estate in succession to the daughters; but I cannot find any words in the will to warrant such a construction. If, indeed, the word *such* had not been introduced in this clause, we might perhaps have said, that, as '*issue*' is *genus generalissimum*, it should include all the progeny. But here the word *such* is relative, and restrains the words which accompany it." That is the true distinction. In *Stanley v. Lennard*, Lord-Keeper *Henley*, in considering the general effect of the words, "for want of issue," said (b)—"Where a man, by his will, makes one tenant for life, with remainder to one, two, three, four, five, &c., of the issue of the tenant for life, and then, for want of issue of tenant for life, limits the estate over, this will be an estate tail in the first taker for life, by necessary implication." In *Wight v. Leigh* (c) a devise to *A.*, and after his death to his first and other sons, and, in default of male issue, then to his eldest and other daughters, and to their heirs male for ever, it was held that it was an estate tail male in *A.*; and that wherever the Court can collect that it is the general intent of a testator that the issue of the tenant for life should inherit the estate before it goes over, they will answer that

(a) 3 Term Rep. 83.

(b) 1 Eden, 95.

(c) 15 Ves. 564.

intent by giving him an estate tail by implication, from the subsequent words, "in default of his leaving issue." Here, therefore, the devise over, upon the four first-named devisees dying *without issue* in the life-time of the annuitants, must be taken to mean a general failure of issue; and as their shares or interest were, on their respective deaths, to go to their daughters, it creates an estate tail by implication in the first-named devisees, although, by the previous part of the will, they only took an estate for life.

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Mr. Serjeant *Wilde* in reply.—It is not necessary to dispute the authority of any of the cases which have been referred to on behalf of the defendants, and which have recognised the established principle, that a devise over, after an indefinite failure of issue, creates an estate tail by implication. Although the Court will not reject the word *such*, they may insert it, in order to give effect to the whole of the will, from the apparent intention of the testator. But here it is not necessary to insert that word, for it is admitted that the testatrix meant that females should be preferred to males, and that is apparent from the whole of the instrument. The word *issue*, therefore, must be taken to apply to the *daughters* of the four first-named devisees; and if the Court were to hold that the mothers took an estate tail, it would not only go to the male issue of the daughters, but they would take in priority; whereas, the testatrix has limited the mothers' shares or interest to the daughters, according to seniority of age and priority of birth, to the exclusion of males. A failure of issue may apply to sex as well as to time; and here it is quite clear, that the testatrix only intended that the estate should go over on failure of daughters, they alone being mentioned in the clause immediately preceding, and who were to take in succession, according to seniority of age, and priority of birth.

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Mr. Serjeant *Taddy* appeared on behalf of the Crown, they claiming an interest in *Jane Spence's* share, she having died without leaving any issue, or an heir-at-law.

But the Court said, that it was quite clear that neither of the four first-named devisees took either an estate in fee, or an estate tail.

Cur. adv. vult.

The following certificate was afterwards sent to his Honour, the Master of the Rolls:—

“ We have heard this case argued before us by counsel, and have considered it; and we are of opinion, that, under the will of *Dorothy Axford*, the said testatrix, *Ann Mary Darwin*, *Mary Lowe*, *Mary Voss*, and *Jane Spence*, took estates for life, as tenants in common, in the premises mentioned in the will.

“ That the daughters of the said *Mary Lowe*, *Mary Voss*, and *Ann Mary Darwin*, also took estates for life in the shares of their respective parents, upon the death of their parents respectively.

“ That *Ann Mary Darwin* took the remainder in fee, in the whole of the said premises.

N. C. TINDAL,
J. A. PARK,
S. GASELKE,
E. H. ALDERSON.”

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BROWNE v. CARR, DODGSON, and BELL.

THE following case was, in pursuance of a decree of His Honour, the Master of the Rolls, directed to be submitted to the opinion of the Judges of this Court.

"The plaintiff came under an engagement of guarantie, or suretyship, to the defendants, who were dealers in silk, and carrying on business in copartnership, for one *James Thomas Barber*, their customer, and delivered to them a note in writing, signed by himself, addressed to the defendants, to the effect following:—

" 'In consideration of your giving *James Thomas Barber* a current credit for silk from this date, I hereby undertake, in consideration of such, upon the event of his failure, to make good any deficiency or loss you may sustain, not exceeding 400*l*.' "

"The defendants afterwards supplied silk to the said *James Thomas Barber*, in the way of his trade, to the amount of 400*l*. and upwards, upon the credit of the said guarantie. *Barber* afterwards became insolvent, and made default in his engagements to the defendants, including the said sum of 400*l*. for silk supplied upon the credit of the said guarantie. The defendants, in consequence of such default, called upon the plaintiff for payment of 400*l*. under the guarantie. The plaintiff, in the course of communications with the defendants, in reference to their demand, wrote and sent to them (amongst others) the letters following, which were duly received; that is to say, a letter of the 16th *February*, 1826, which contained the following passages:—

" 'I have just received the inclosed from Mr. *Barber*, who seems to wish it to be believed that he has not one penny left, or done any thing fraudulent, and that he intends taking the benefit of the Insolvent Act. I conclude, he is arrested at your suit; if not, perhaps you can tell me at whose it is, as, otherwise, I suspect it is a made up ar-

A. guaranteed the payment of goods to be supplied by *B.* to *C.*—*C.* became bankrupt, and *B.* proved under his commission, and afterwards signed his certificate, although *A.* gave him notice not to do so:—*Held*, that, nevertheless, *A.* was not discharged from his liability as surety, as it was his duty to have paid the debt due from *C.* to *B.*; but as he neglected to do so, and permitted *B.* to prove under *C.*'s commission, *B.*'s signing the certificate was not such an act as to alter *A.*'s right without his control or consent, as he might have paid the debt in due time, and thereby prevented *B.* from proving under the commission.

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rest. If he is declared a bankrupt, I imagine he cannot take the advantage he wishes. Be pleased to inform me, by return of post, what is best to be done. I find I cannot make him one myself, because I have not as yet paid any of my acceptances. I hope that you, gentlemen, who understand these things, will take the business on yourselves, by which alone the utmost will be obtained, as I really do not like my name to be coupled with such a rogue as he is. I hope to hear from you in reply.

I am, gentlemen, your's, &c.,

Philip Browne.

“ ‘ P.S. Should *Barber* have made any arrangement to get released through the Insolvent Act, pray put a stop to it.’

“ A letter of the 9th *April*, 1826, contained the following passage:—

“ ‘ I have a notice that Mr. *Barber* means to take the benefit of the Insolvent Act. I conclude in his schedule he has named you as a principal creditor, which no doubt he has done; I therefore trust you will take steps to oppose him for the full amount of the 400*l*. I am his guarantie to you for; especially so, as you are aware of the disposal of his property in the way he did, to the several houses you traced it to.’

“ In answer to the last-mentioned letter, the defendants wrote a letter to the plaintiff, dated the 10th *April*, 1826, to the following effect:—

“ ‘ We have had a sight of *Barber's* schedule. He appears to have no effects for his creditors; and, from past experience, it is useless opposing him in this Court. We hope you will take the earliest opportunity of remitting us on account of your guarantie.’

“ A commission of bankrupt, bearing date the 18th *April*, 1826, was issued against the said *James Thomas*

Barber, under which he was found and declared a bankrupt, and the usual proceedings were taken.

"On the 3rd *June*, 1826, the defendants proved under the said commission the sum of 597*l.* 9*s.* 7*d.* as a debt due to them by the said *James Thomas Barber*, which comprehended the sum of 400*l.* for silk supplied to him, and covered by the said guarantie of the plaintiff.

"On the said 3rd *June*, being the day appointed for the bankrupt to pass his last examination under the commission, the defendant *Carr* was present, and heard the examination of the said *James Thomas Barber*, which then took place; when, by reason of the unsatisfactory nature of the accounts given by him of his estate and effects, the examination was adjourned by the commissioners to the 20th of the same month, of which *Carr* was well aware. On that day, the bankrupt attended the commissioners for the purpose of passing his last examination; but, after his undergoing an examination, the commissioners again refused to pass his last examination, and adjourned the same *sine die*, at the same time severely reprimanding the bankrupt. The bankrupt afterwards procured another meeting of the commissioners to be duly held on the 29th *July* following; on which day, the commissioners, after severely reprimanding him for the dishonesty of his conduct, passed his last examination.

"On the same day, *vis.* the 29th *July*, and immediately after the bankrupt had so passed his last examination, the plaintiff's solicitor went to the counting-house of the defendants, and then and there told the defendant *Dodgson*, that if they, the defendants, persisted in holding the plaintiff liable upon the before-mentioned guarantie, they should not sign the certificate of the said bankrupt; and, on the part of the plaintiff, gave notice to *Dodgson* not to sign such certificate; when *Dodgson* said he did not care for the plaintiff or the said solicitor, and that he should sign such certificate, notwithstanding his notice;—or used words to that

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effect. As the solicitor was leaving the counting-house, the bankrupt came in, at which time the defendant, *Dodgson*, signed the bankrupt's certificate of conformity; and such certificate was a few days afterwards signed again by the defendant, *Bell*.

"Besides the said debt of the defendants of 597*l.* 9*s.* 7*d.*, the following debts were also proved against the bankrupt under the commission, *viz* 180*l.* 18*s.*, 4*l.* 6*s.* 8*d.*, and 51*l.* 5*s.* All the creditors, with the exception of the creditor for the sum of 4*l.* 6*s.* 8*d.*, signed the bankrupt's certificate of conformity; and the same was afterwards duly signed by the major part of the commissioners, and was afterwards allowed by the Lord Chancellor."

The question for the opinion of the Court was—

"Whether the defendants, having, under the circumstances of this case, signed the certificate of *James Thomas Barber*, who had become a bankrupt, the plaintiff, the surety for the said *James Thomas Barber* to the defendants, became discharged thereby from the claims of the defendants in respect of such suretyship."

The case came on for argument in the last Term.

Mr. Serjeant *Spankie* for the plaintiff.—The question in this case is one of considerable importance, namely, whether a creditor, pending an action on a guarantie against a surety, who contests the question of his liability, does not discharge such surety, by signing the certificate of the principal debtor, under a commission of bankrupt awarded against him, the surety having previously given the creditor notice not to sign the certificate. The case of *Rees v. Berrington* (a) established the principle, that, where a creditor gives time to the principal debtor, without knowledge of the surety, or otherwise varies the nature of the security, or in any way prejudices the rights of the surety

(a) 2 Ves. jun. 542, n.

against the debtor, the surety is discharged. So, *Nisbet v. Smith* (a), and *Burke's* case, cited in *Ex parte Gifford* (b), are authorities to shew, that a creditor giving the principal debtor further time for payment, releases the surety. In *Mayhew v. Crickett* (c), a creditor, whose debt was secured by a warrant of attorney, having received promissory notes from the debtor and two sureties; and afterwards entered up judgment and taken the goods of the debtor, and, without the knowledge of the sureties, withdrew the execution, Lord *Eldon* said—"The defendants, by releasing the execution, had relinquished their remedy, at least, *pro tanto*. I always understood, that if a creditor takes out execution against the principal debtor, and waives it, he discharges the surety, on an obvious principle, which prevails both in Courts of law and in Courts of equity." So, if the creditor part with any lien, or other legal means which he may have in his hands, of reimbursing himself, the surety is no longer liable. That was decided in the case of *Law v. The East India Company* (d); and the Master of the Rolls there said—"It cannot be contended, upon any principle that prevails in regard to principal and surety, that, where the principal has left a sufficient fund in the hands of the obligee, and he thinks fit, instead of retaining it in his hands, to pay it back to the principal, the surety can ever be called upon." A surety is entitled to the benefit of every security or remedy which the creditor has against the principal. Here, then, the question is, whether the defendants, having assented to discharge the bankrupt, by signing his certificate, have not thereby relinquished an advantage against him, (the debtor), of which the plaintiff, as his surety, might have availed himself? Although it may be said that a bankrupt can only be discharged by his certificate, and that it cannot be procured without the

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(a) 2 Brown's Chan. Cas. 579.

(c) 2 Swanst. 185.

(b) 6 Ves. 809.

(d) 4 Ves. 824.

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concurrence of a certain number of his creditors, and that their signature is a condition precedent to the obtaining of the certificate; yet here, the act of signing by the defendants was purely voluntary, and they could not be required by law to do so; and, by such act, they either expressly or impliedly violated the contract between themselves and the plaintiff, as surety, which contract was, that, in default of the principal debtor, the surety should, if called upon by the creditors, pay the debt due to them; and that the creditors should, in return, give to the surety every benefit which the creditors might themselves possess of enforcing their demands against the debtor. If the defendants had refused to sign the certificate, the bankrupt might have been sued at any time; and the plaintiff, as his surety, would have a legal remedy to enforce his demands. Besides, the plaintiff gave the defendants notice not to sign the certificate; and by their doing so, contrary to his directions, they not only discharged the bankrupt, but deprived the plaintiff, as his surety, of any remedy he might have against him. In *Bulleel v. Jarrold* (a), where, to an action on a recognizance of bail, the defendant pleaded, that, after the making the recognizance, the plaintiffs entered into an agreement with the principal in the bail-bond, without the privity of the bail, to take goods from the principal, to secure the payment of part of the money recovered, and that such goods were consigned to them accordingly; although the question was discussed, as to whether the surety was discharged, by time being given by the creditor to the original debtor; yet the Court gave no opinion on the point, the plea being bad, on the ground that the agreement, being by parol, could not be pleaded in bar of an action arising on matter of record. Although, in *Langdale v. Parry* (b), where the plaintiffs proved their whole debt under a commission

(a) 8 Price, 467.

(b) 2 Dow. & Ryl. 337.

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against their principal debtor, and signed his certificate without the consent of the defendant, who was surety for the bankrupt, it was insisted, that he was thereby discharged; on the ground, that, as the surety had a right to enforce against the principal all the claims which the creditor had against him, the creditor, by giving up any of those claims, prejudiced the surety, and thereby discharged him from his original liability; yet the Court said, "that it was not necessary to decide the more general question, whether a creditor, who proves his debt under a commission issued against his principal debtor, and afterwards enables him to obtain his certificate, behind the back of the surety, does not, in any case, discharge the surety, because there were circumstances in the case before the Court which might well take it out of any general rule upon the subject." There, the surety had absented himself, and was not to be found for eight years; and, as the Court justly observed, "it would be too much to say, that a bankrupt, who conducts himself well, is to be deprived of all chance of obtaining his certificate, and reinstating himself in business during so long a time, merely for the sake of a man who has become his surety." Although the present plaintiff obtained an injunction to restrain the defendants from suing out execution; and Lord *Eldon* was of opinion (a), that no equity arose in favour of the plaintiff out of the conduct of the defendants, in enabling the bankrupt, by their signature, to obtain his certificate; yet all the facts of the case were not before his Lordship, and his decision does not affect the question now before the Court. In *Ex parte Taylor*, in the matter of *Herbert* (b), it was held, that a party who had proved a debt, and afterwards assigned it, could not sign the bankrupt's certificate without the authority of the assignee; for the Vice-Chancellor said—"The signing of the certificate is an im-

(a) 2 Russ. 608.

(b) 1 Glyn & Jam. 399.

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portant act of administration as to the property assigned, and cannot be done without the authority of those who are entitled to the property under the assignment;" and here, if the defendants intended to enforce their claim against the bankrupt's estate, they were bound to consider themselves as trustees for the plaintiff, as his surety, to the amount of the sum for which he was liable, and which they proved under the commission, and to deal with it according to his directions; but, as they signed the certificate contrary to the notice given them by the plaintiff, they materially altered the situation in which he stood, and deprived him of his remedy against the principal debtor, which would otherwise have remained to him. Although, in *Ex parte Herbert*, in the matter of *Herbert (a)*, Lord Eldon discharged the order of the Vice-Chancellor in *Ex parte Taylor*, and directed the certificate to be allowed; yet it was on the special ground that the equitable right of the persons seeking to restrain the creditor who had proved, did not accrue until after the bankruptcy; for, said his Lordship, "My doubt in this case is, whether the legal title of the original creditor can be restrained by persons who have no right in themselves to control the certificate, as their interest accrued *subsequently* to the commission." In *Ex parte Smith (b)*, where the indorser of a bill of exchange became bankrupt, and the holder proved the amount under the commission, and afterwards compounded it, and discharged the acceptor without notice to the assignees of the indorser, it was held, that he thereby also discharged the indorser's estate, and that the proof of his debt should be expunged.

Mr. Serjeant *Jones, contra*.—The question for the opinion of the Court is purely a question of law, and they will not consider the equitable rights of the parties; and

(a) 2 Glyn & Jam. 66.

(b) 3 Brown's Chan. Cas. 1.

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although a creditor cannot work an injustice, or deprive a surety of his legal rights against the principal and original debtor, yet, on the other hand, the surety cannot stand out to the injury and prejudice of the creditor. Although the defendants signed *Barber's* certificate, it did not discharge the debt due by him, neither did they give him time for payment; and the plaintiff had all the benefit which he could have had if the certificate had not been signed, *vis.* the dividends to be derived from the bankrupt's estate. The plaintiff not only gave the defendants notice not to sign the certificate, but, at the same time, disputed his liability to pay them their debt. The defendants had an interest in the debt against the bankrupt, as well as against the plaintiff as his surety; and the plaintiff's right to prove against *Barber's* estate accrued subsequently to his bankruptcy. He, therefore, could have no authority to circumscribe the rights of the defendants, before he had paid them their debt; and if he had done so, it is quite clear that he might have come in and proved under *Barber's* commission. The 52d section of the statute, 6 *Geo.* 4, c. 16, enacts—"That any person who, at the time of the issuing of the commission, shall be surety, or liable for any debt of the bankrupt, *if he shall have paid the debt*, if the creditor have proved under the commission, shall be entitled to stand in the place of such creditor, as to the dividends; or, if the creditor shall not have proved, then that the surety shall be entitled to prove his demand, in respect of the payment so made by him, as a debt under the commission." The surety, therefore, must pay or satisfy the debt due to the creditor from the bankrupt, before he can prove under the commission; and if the creditor has already, as in this case, proved, the surety is to stand in his place as to the dividends, and all the other rights to which the creditor may be entitled. If, therefore, the surety declines to pay the debt, but permits the creditor to prove, he is still liable on his guarantie; and although the creditor afterwards signs

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the bankrupt's certificate, without the consent of the surety, or even after notice by him not to do so, yet it does not affect or impair his legal rights; for, as he has paid no part of the debt, he has nothing to complain of; and, by his own laches in not satisfying the creditor, he loses his claim against the bankrupt, and the creditor is not only morally justified, but is performing a duty legally imposed on him, in signing the bankrupt's certificate, when he has conducted himself properly, and in conformity with the bankrupt laws. It is quite clear that this Court will not extend the rights of a surety beyond what a Court of equity has deemed him to be entitled to; and when these parties came before Lord *Eldon*, he said (a)—“That no equity arose in favour of the plaintiff out of the conduct of the defendants, in enabling the bankrupt, by their signature, to obtain his certificate. That it appeared that the alleged surety (the plaintiff) had been keeping the creditor at arm's length at law, and did not, during the action, admit his character of surety, but was strenuously contesting his legal liability. That, as the law now stood, the surety might go in under the commission and prove; he had distinct and independent rights of his own; and if he did not choose to take the course which would enable him to assert these rights, he could not expect aid from a Court of equity.” That is conclusive of this question; independently of which, the case of *Ex parte Herbert* is an express authority to shew, that, where a creditor, having proved a debt, sold and assigned it, he might afterwards sign the bankrupt's certificate, without the assent of the assignee; and here the plaintiff not only had never paid the debt, but disputed his liability to do so. In the case of the *Trent Navigation Company v. Harley* (b), the laches of obligees in a bond, conditioned for the principal obligor to pay over such monies as he should collect for the obli-

(a) 2 Russ. 603.

(b) 10 East, 34.

gees, and they did not call upon him for payment as soon as they might have done, was held not to be an estoppel at law, in an action against the sureties on the bond; and Lord *Ellenborough* said, he knew of no such estoppel at law, whatever remedy there might be in equity. That principle is applicable to the present case; and in *Davey v. Prendergrass* (a), it was expressly decided that it was no defence at law to an action on a bond against a surety, that, by a parol agreement, time had been given to the principal; and Mr. Justice *Holroyd* said (b)—“The merely giving an engagement that a man shall not sue for a limited time, is not a release in law of the original debt. An agreement that a man shall not sue at all, with a good consideration for it, amounts to a release, and would be an annihilation of the original debt; but, an agreement to give a limited time to pay the debt, does not destroy the original debt, nor the liability to the payment of it.” So, here, although the defendants signed the bankrupt’s certificate, there was no release of the original debt; it still remains, and the plaintiff might, if he had thought fit, have stood in the place of the defendants, by paying the debt, and proving it under the commission.

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Mr. Serjeant *Spankie*, in reply.—Courts of law are always inclined to favour a surety; and here the plaintiff was not bound to pay the debt in the first instance, he might have waited, for the purpose of ascertaining whether the bankrupt’s estate would not be sufficient to pay the defendants their demand in full, or the commission might have been superseded. The defendants could not compel the plaintiff to come in and prove, neither could they deprive him of any of his legal and subsisting rights, as far as regarded *Barber*, the principal debtor, and which would have remained to the plaintiff, if the defendants had not signed

(a) 5 Barn. & Ald. 187.

(b) Id. 193.

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his certificate. Wherever a person becomes a surety, or renders himself responsible for the debt of a third person, it is in the nature of a condition precedent, on the party who requires the security, to do nothing to prejudice or affect the rights of the person giving it, as against the original debtor. If the holder of a bill of exchange give the acceptor time for payment, the drawer and indorsers are thereby discharged; and here the plaintiff's claim remained against *Barber*, until the defendants signed his certificate; and, by so doing, they defeated his right altogether, as the certificate operated as a discharge of the bankrupt by the defendants' own voluntary act, and after they had express notice from the plaintiff not to sign the certificate. In *Davey v. Prendergrau* the ground of the decision was, that an obligation created by an instrument under seal, could only be discharged by force of an instrument of equal validity. In the case of the *Trent Navigation Company v. Harley*, the surety had no legal defence to the action on the bond, as it was a condition precedent on the part of his principal to render an account regularly to the obligees, and they were not bound to examine it until he had furnished it. There, too, the legal rights or situation of the surety were not altered as far as they regarded his principal; but where a creditor gives time to the original debtor, the mere act of suspension operates as a discharge to the surety; and here *Barber* was absolutely discharged by the defendants signing his certificate, they being his creditors, and acting against the express directions of the plaintiff. By so doing, they deprived the plaintiff of his remedy over against *Barber*, and yet they now call upon him to pay the full amount for which he undertook to be liable.

Lord Chief Justice TINDAL.—As this case raises a question of considerable importance, and is not altogether free from doubt, we will look into the authorities, and state the

grounds of our opinion, before we send our certificate to the Master of the Rolls.

Cur. adv. vult.

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Lord Chief Justice TINDAL now delivered the judgment of the Court as follows:—

Upon consideration of the question referred to us by his Honour, the Master of the Rolls, whether the signature of the certificate of *Barber*, the bankrupt, by the defendants, his creditors, operates in law as a discharge to the plaintiff, who is surety for *Barber's* debt, we are of opinion, that the legal liability of the surety is not thereby discharged.

The ground upon which it has been contended that this proceeding amounts to a release, is the general acknowledged principle, that, wherever the creditor so deals with his debtor as to alter the rights of the surety against the debtor, the surety is discharged at law. Thus, if a man is surety for the payment of a debt at a particular day, and the creditor extends the day of payment without the consent of the surety, his liability is destroyed. And the reason is, because the remedy of the surety against the principal may become more uncertain by postponement; because he became surety for the performance of one certain duty, and not for the other, which the creditor has thought proper to substitute for it of his own authority. The instance where the holder of a bill of exchange gives time to the acceptor, without the authority of the drawer, and thereby discharges the drawer, is the most familiar; and, as the consequence of signing the certificate of the debtor is to release his person from the arrest of the surety, and his future effects from execution, the damage done to the surety by the act of the creditor, that is, supposing the debt to be paid, appears sufficient to give the surety the right to complain.

In these, and in all similar cases, however, the act done by the creditor is his own act, over which the surety has

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no control; and the injury which the surety would receive, is one which he has no mode of preventing. But, in the present case, neither of those circumstances occurs. The Legislature has provided that the surety, if he pays the debt, may stand in the place of the creditor, where the creditor has proved; or may prove the debt himself, where the creditor shall not have proved under the commission. It is the duty of the surety to pay the debt; and, if he declines so doing, and thereby permits the creditor to prove, the signing the certificate of conformity, which is a power given by the statute to the proving creditor, cannot be considered as an act done by the creditor, which altered the surety's rights without his control, and scarcely, indeed, without his consent. It is not an act beyond his control, for he might have paid the money in due time, and prevented the creditor from proving: and if he voluntarily lies by, and omits the only means of preventing it, he may not unreasonably be considered to have assented to the act. Besides, the signing the certificate, where the creditor is satisfied that the bankrupt has conformed to the provisions of the statute, is a moral obligation on the creditor; it is a power vested in him by the act, which he is morally bound to exercise where the truth of the case requires it. The exercise of such a power, therefore, by the creditor, where he is placed in the condition to exercise it by the laches of the surety, cannot be considered as ranging itself under those voluntary acts of the creditor which release the surety. Indeed, the situation of a bankrupt circumstanced as the present, would be very hard, if the notice given by the surety were to deprive the creditor who has proved of his right to sign the certificate. For the surety could not sign it at the time of the notice, and *non constat* that he would ever be able, as he may never pay the debt; so that, according to the surety's argument, the certificate could never be signed by the one or the other.

We shall certify our opinion to the above effect to his Honour.

The following certificate was afterwards sent:—

“ We have heard this case argued by counsel, and have considered it, and are of opinion that the plaintiff, as surety for the said *James Thomas Barber* to the defendants, was not discharged at law from the claims of the defendants, in respect of such suretyship, by the defendants' having, under the circumstances of this case, signed the certificate of the said *James Thomas Barber*, who had become bankrupt.

N. C. TINDAL.

J. A. PARK.

S. GASELER.

E. H. ALDERSON.”

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AT the trial of this cause, at *Guildhall*, at the Sittings after *Michaelmas* Term, 1829, the Jury found a verdict for the plaintiff, damages, 260*l*. In *Hilary* Term, 1830, the defendant obtained a rule *nisi* for a new trial, upon affidavits, which stated that he had been unable to procure the attendance of a person of the name of *King*, who was a material and necessary witness for the defendant.

The Court afterwards directed a new trial, on the terms of the defendant's paying the amount of the verdict into Court, which he accordingly did.

Mr. Serjeant *Storks* in the last term obtained a rule *nisi* that the defendant might be at liberty to take this money out of Court, on his undertaking to give security to the satisfaction of the Prothonotary.—The motion was founded on an affidavit, which stated, that, since the trial, the defendant had filed a bill in equity against the plaintiff for a discovery; that the plaintiff having failed to put in a satisfactory answer, was now in contempt in the Court of *Chancery*; and that he was residing at *Paris*, for the purpose of avoiding his creditors. The defendant also swore that al-

Monday,
May 23rd.

The defendant obtained a new trial, on the ground of the absence of a material witness, upon the terms of the defendant's paying into Court the amount of the verdict for the plaintiff. The Court would not afterwards allow the defendant to take the money out upon an affidavit, which stated that the plaintiff was in contempt in the Court of *Chancery* for not putting in an answer to a bill for a discovery which the defendant had filed against him, and which answer, if true, would constitute a good defence to the action.

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though he could now procure the attendance of *King*, yet, if the plaintiff put in a true answer, the defendant verily believed it would disclose a good and full defence to this action.

Mr. Serjeant *Jones* now shewed cause.—The rule for a new trial was made absolute on condition of the defendant's paying the amount of the verdict into Court, on one specific ground only, *viz.* the absence of the witness *King*; and, although the defendant has since filed a bill against the plaintiff for a discovery, it might be on a matter which would not affect the merits of this cause.

Mr. Serjeant *Storks*, in support of his rule.—As the plaintiff neglected to put in a satisfactory answer to the defendant's bill, and was now not only in contempt for not having done so, but actually residing abroad, and out of the jurisdiction of the Court, the defendant is entitled to have the sum paid in restored to him, on his undertaking to give security to be approved of by the Prothonotary; particularly, as it is sworn that the answer, if true, will disclose a full and perfect defence to this action.

Lord Chief Justice TINDAL.—It appears to me that there is no ground for this application. The defendant asked a favour of the Court in the first instance, *viz.* to grant him a new trial on one specific and limited ground, namely, the absence of a material and necessary witness for him on the first trial. It now appears that he can procure the attendance of that witness, and there is no reason why the defendant should be placed in a more eligible situation by having filed a bill for a discovery against the plaintiff; neither ought he to better his condition by interposing a new matter which was not suggested to us at the time of the application for the new trial. The sum paid in by the defendant, may be laid out by the Prothonotary in *Exchequer* bills, or any other security he may approve of, and the party who may be ultimately found to be entitled to it, will re-

ceive it with interest. I therefore think, that, under the circumstances, it ought not to be returned to the defendant.

The rest of the Court concurring—

Rule discharged.

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HOPKINSON.

PRESTWICK and Another v. MARSHALL.

Tuesday,
May 24th.

THIS was an action by the plaintiffs as holders of a bill of exchange for 26*l.* 5*s.*, purporting to be drawn by one *Lydia Bickerstaff*, payable to herself, or order, upon and accepted by the defendant, and indorsed by the said *Lydia Bickerstaff* to the plaintiffs.

A bill of exchange was signed and indorsed by a married woman as drawer, with the assent and in the presence of her husband, who afterwards negotiated it to the plaintiffs, without indorsing it:—*Held*, that they were entitled to recover against the acceptor, as the property in the bill passed to them by the indorsement of the wife, it having been made under the authority of her husband.

At the trial, before Mr. Justice *Bosanquet*, at *Guildhall*, at the Sittings in the last term, it appeared, that Mrs. *Bickerstaff* was a married woman, and kept a boarding-school for young ladies at *Kensington*, where the defendant had placed one of his daughters, for the purpose of being educated; that upon Mrs. *Bickerstaff*'s husband applying to the defendant for payment of 26*l.* 5*s.*, for the board and tuition of his daughter, he agreed to accept a bill for that amount; but he requested that it might be signed by Mrs. *Bickerstaff*, as the engagement as to the terms on which the child was to be educated, was made between Mrs. *B.* and the defendant; that the bill was drawn accordingly; that the body of it was in the handwriting of Mr. *Bickerstaff*, but it was signed and indorsed by his wife in her own name: and on his being called as a witness, he admitted that his wife signed and indorsed the bill in his presence. It also appeared, that, on a former occasion, the defendant had accepted a bill for a similar amount, and in the same form as the present, which the defendant had also requested to be drawn in the name of Mrs. *Bickerstaff*, but which her husband had indorsed, and which was paid by the defendant when it became due. It further appeared, that Mr. *Bickerstaff* was a clerk and

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book-keeper to the plaintiffs, and that two or three days after the bill was accepted, he gave it to them, who discounted it for him without requiring his indorsement. He however stated at the trial, that he was not indebted to the plaintiffs when he gave them the bill, and that they had not given full value for it. Under these circumstances, it was objected for the defendant, that the plaintiffs were not entitled to recover, as no property in the bill passed to them by the indorsement of Mrs. *Bickerstaff*, the wife, and that they were not *bond fide* holders for a valuable consideration. The learned Judge, however, was of opinion, that, as the bill was signed and indorsed by Mrs. *Bickerstaff*, with the approbation and authority of her husband, and in his presence, her indorsement was sufficient to pass the property in it to the plaintiffs; and the Jury having found that they became possessed of it *bond fide*, and were holders for a valuable consideration, a verdict was entered for them for the amount of the bill: leave being reserved to the defendant to move to set it aside and enter a nonsuit, if the Court should be of opinion that the indorsement by Mrs. *Bickerstaff* was not sufficient to give the plaintiffs an interest in the bill.

Mr. Serjeant *Cross*, in the last term, obtained a rule *nisi* accordingly, and submitted, that the indorsement of the bill by the wife was not sufficient to transfer it to the plaintiffs. In Mr. *Justice Bayley's Treatise on Bills of Exchange*, it is said (a), "Bills cannot properly be made, indorsed, or accepted by a *feme covert*, unless where she acts by authority from her husband. Her living apart from her husband gives her no capacity to draw, indorse, or accept." And in *Barlow v. Bishop* (b), where a promissory note was given by the defendant to a married woman, whom he knew to be such, with an intent that she should indorse it to the plaintiff in payment of a debt which

(a) 4th Edit. p. 40.

(b) 1 East, 432; S. C. 3 Esp. Rep. 266.

she had contracted with him in the course of carrying on a trade on her own account by the consent of her husband—it was held that the property in the note vested in the husband by the delivery to the wife, and that no interest passed by her indorsement in her own name to the plaintiff. At all events, the defendant is entitled to a new trial, as the plaintiffs did not shew that they were the *bond fide* holders of the bill, or that they received it in the ordinary course of business. If they had, they would have required the husband to have indorsed it, he being in their employ at the time; but he said that he was not indebted to them, and that they had not given him full value for the bill. The Court, however, thought there was no weight in the latter objection, the only question being, whether the plaintiffs had acquired an interest in the bill through the indorsement by the wife.

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Mr. Serjeant *Andrews* now shewed cause.—As the bill was drawn in the name of Mrs. *Bickerstaff*, at the defendant's own request, and he had accepted and paid a former bill drawn in the same form, and for a like amount, he is estopped from raising any objection as to the mode by which it was transferred to the plaintiffs, he being the acceptor, and primarily liable to the payee, to whom he gave the bill in payment for the education of his daughter. But the body of the bill was in the hand-writing of the husband, and he saw his wife sign and indorse it; she therefore acted under his express authority, which distinguishes this case from that of *Barlow v. Bishop*: and in *Cotes v. Davis* (a), it was held, that if a promissory note be made payable to a married woman, and she indorses it for value in her own name, and the maker afterwards promises to pay it, in an action against him by the indorsee, it will be presumed that the nominal payee had authority from her husband to indorse the note in that form: and that the in-

(a) 1 Camp. 485.

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dorsement is to be considered as vesting a legal title to the note in the party to whom it was indorsed. And here the husband not only authorized the drawing and indorsing of the bill by his wife, but the mode in which it was to be drawn was pointed out by the defendant himself.

Mr. Serjeant *Cross*, in support of his rule.—No legal title passed to the plaintiffs by the indorsement of the bill in question by the wife; and, although it has been said that the defendant cannot raise the objection, as he requested the bill to be drawn in her name, and he had accepted and paid a former bill drawn in the same form, yet that bill was indorsed by the husband; but, as this was not, it must be assumed that the plaintiffs were not the *bond fide* holders; they should certainly have required an indorsement by the husband, and as they did not do so, they were not entitled to sue upon it. As there was no evidence of any direct authority by the husband for his wife to indorse the bill, the case of *Barlow v. Bishop* is decisive of the question; and Lord *Kenyon* there said—"It is clear that the delivery of the note to the wife vested the interest in her husband; and as he permitted her to carry on trade on her own account, and this was a transaction in the course of that trade, if she had indorsed the note in the name of her husband, I am not prepared to say that that would not have availed, as many acts of this nature may be done by a power of attorney; and the Jury might have presumed what was necessary in favour of an authority from her husband for this purpose. But the indorsement being in her own name, it is quite impossible to say that she could pass away the interest of her husband by it. And this is not like a note payable to the order of a fictitious person, to whom no interest can pass; but here the interest passed to the husband." And here, as the husband did not indorse the bill to the plaintiffs, no property in it passed to them; and if the defendant were to pay it, he would be liable again in an action at the suit of the husband. In *Cotes v. Da-*

sis, the defendant promised to pay subsequently to the indorsement. Here, however, there was no evidence of such a promise. On the contrary, the defendant resisted the payment, and there was not sufficient evidence to shew that the wife indorsed the bill with the authority of her husband.

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Lord Chief Justice TINDAL.—It appears to me, that this case is clearly distinguishable from that of *Barlow v. Bishop*, which has been relied on for the defendant. There, the party who indorsed the note was a married woman, carrying on trade in her own name, as a *feme sole*. The maker gave her the note for her own benefit, but it did not appear that her husband was cognizant of the transaction. Here, however, the husband was the main or principal party, who put the whole in motion at the outset. He, being in want of money, called on the defendant for payment of a sum due to his wife for the education of the defendant's daughter. The husband himself drew and filled up the body of the bill, which was afterwards signed and indorsed by his wife in his presence. The defendant knew the state of the parties, and was also acquainted with all the circumstances attending the concoction of the bill; as, upon a previous occasion, he had accepted a bill drawn upon him in a similar form, and for a like demand, at his own request. But it has been insisted, that the signature and indorsement of the bill by the wife, did not pass any property in it to the plaintiffs. But the husband took it to them, who were his own employers, and received money upon it from them for his own use. He, therefore, cannot afterwards set up any conflicting claims, as between himself and the plaintiffs, he having obtained value from them for the bill, and been privy and assenting to the signing and indorsing of it by his wife. In *Barlow v. Bishop*, no authority of the husband for the wife to indorse the note was shewn; and, although Lord *Kenyon* said that the Jury might have presumed what was necessary in fa-

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vour of an authority from him to indorse the note, yet here no such presumption was necessary, as there was actual and positive proof of that fact, by the husband's own admission. This, therefore, brings the present case within the decision of *Cotes v. Davis*, where a note was made payable to a married woman, and she indorsed it for value in her own name, and the maker afterwards promised to pay it. In an action against him by the indorsee, Lord *Ellenborough* held that it was to be presumed that the nominal payee had authority from her husband to indorse the note; and he also ruled, that such indorsement vested a legal title in the plaintiff; "for," said his Lordship, "the husband may authorize the wife to indorse bills as his agent; and, after the acknowledgments and promises of the defendant, it may reasonably be presumed against him, that Mrs. *Carter* (the person to whom the note was payable) had authority from her husband to indorse it." And on its being insisted by counsel that the indorsement ought to have been in the name of the husband, his Lordship said—"We may fairly carry the presumption one step farther, and presume, that the husband authorized her to indorse notes in the name by which she herself passed in the world." Here, however, there is no necessity for presuming an authority by the husband to his wife to indorse the bill in question, as he admitted at the trial that he saw her sign and indorse it.

Mr. Justice *PARK*.—I do not differ from the decision of the Court of *King's Bench* in *Barlow v. Bishop*. On the contrary, I think, from the circumstances of that case, it was rightly determined. Lord *Kenyon* there said—"Many acts of this nature may be done by a power of attorney, and the Jury might have presumed (that is, from the circumstances and facts proved before them,) what was necessary in favour of an authority from the husband for this purpose." Here, however, there was sufficient evidence to warrant an authority from the husband, he himself hav-

ing in fact admitted it. The case of *Cotes v. Davis* appears to me to go farther than it is necessary for us to do in the present; for, it appears that Mrs. *Bickerstaff* kept a school for the education of young ladies, and carried it on in her own name; that the defendant had placed his daughter there; and that, on a former occasion, he had accepted a bill drawn by Mrs. *Bickerstaff* in the same form, and for the same amount as the bill in question: because, as the business was carried on by her in her own name, and on her separate account, the defendant thought that a bill drawn by her would be the better security. Besides, it appears that he requested that the bill might be signed by her, and which she did in the presence of her husband, who also saw her indorse it, and he himself passed it to the plaintiffs. In *Cotes v. Davis*, the female to whom the note was payable, indorsed it in the name by which she was known to the world; and, although it has been said that this case is distinguishable, as there was a subsequent promise by the maker to pay the note, and Lord *Ellenborough* said—"After the acknowledgments and promises of the defendant, it may reasonably be presumed against him, that the payee of the note had authority from her husband to indorse it; and further, that he authorized her to indorse notes in the name by which she herself passed in the world;" yet here there was no necessity for such a presumption; and, although there was no subsequent promise by the defendant, yet there was sufficient proof of the previous authority of Mrs. *Bickerstaff's* husband for her signing and indorsing the bill in question.

Mr. Justice GASELEE.—The circumstance that the first bill was indorsed by the husband, cannot avail the defendant. It does not appear how or to whom that bill was negotiated; and it might have passed to a party who required the husband's indorsement. The bill in question

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was drawn in the same form as another which the defendant had accepted and paid, and he requested that this bill might be signed by Mrs. *Bickerstaff*, although he knew that she was a married woman, and that her husband was alive; and the husband was not only privy, but assented to and assisted throughout the whole of the transaction, from the time of the drawing of the bill to the passing it to the plaintiffs. The defendant, by accepting the bill as drawn, undertook to pay Mrs. *Bickerstaff* in her own name, as the payee, and it is not necessary for us to presume an authority by her husband for her to draw and indorse the bill, as he not only expressly assented to both these acts, he being present at the time, but he also delivered it to the plaintiffs after it was so indorsed. I therefore think that the verdict which was found for them was proper, and ought not to be disturbed.

Mr. Justice BOSANQUET.—I am also of opinion that the plaintiffs are entitled to recover. The question is, whether the indorsement of the bill in the name of the wife passed the property in it to the plaintiffs, to whom it was negotiated by the husband himself. There can be no doubt but that the bill was signed and indorsed by the wife with his express authority and assent. In *Barlow v. Bishop*, there was no circumstance or fact in evidence, to shew that the husband authorized his wife to indorse the note; and Lord *Kenyon* said, that, if she had indorsed the note in the name of her husband, he was not prepared to say that that would not have availed. In *Cotes v. Davis*, although the indorsement was not in the name of the wife, yet Lord *Ellenborough* said, that it might be presumed that the husband authorized her to indorse notes in the name by which she herself passed in the world; and, although there the maker promised to pay the note subsequently to the indorsement, such promise must be necessarily taken to refer to the previous authority by the hus-

band to the wife, to indorse the note in the name she used; and that such authority might be presumed. Here, however, the authority of the husband does not rest on mere presumption, but on the positive proof of acts done by him, who, subsequently to the indorsement by his wife in his presence and with his assent, negotiated the bill to the plaintiffs for his own benefit. There appears to me, therefore, to be no doubt but that the bill was drawn and indorsed by the wife, with the assent and authority of the husband, and that the property in it passed to the plaintiffs; and, consequently, that there is no ground to disturb the verdict which has been found for them.

This rule, therefore, must be—

Discharged.

ABBOTT v. PARSONS.

THIS was an action for work and labour by the plaintiff, as a schoolmaster, in which he sought to recover from the defendant the sum of 31*l.*, for half a year's board and education of two of his sons. The defendant pleaded a set-off of various sums paid by him to the plaintiff's use; and the particulars of set-off contained, among several others, the following *item, viz.* "Cash paid to *Mann* for flour, at the plaintiff's request, 18*l.* 6*d.*"

At the trial, before Mr. Justice *Gaselee*, at the last Assizes at *Thetford*, the defendant called witnesses, who proved, that flour to the amount stated in the particulars had been delivered by *Mann* to the plaintiff; that, some months before the commencement of this action, *Mann* sent in his bill to the plaintiff, when his wife told him that it was a mistake, and desired him to apply to the defendant, and that no demand had been since made on the plaintiff for the flour. After the learned Judge had begun to sum up the evidence to the Jury, the plaintiff's

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The defendant having closed his evidence in support of certain items in a particular of set-off, and the Judge having begun to sum up to the Jury:—*Held*, that it was too late for the plaintiff's counsel to object to the sufficiency of proof of one of such items.

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counsel objected, that the defendant had not proved that he had paid *Mann* for the flour, and which he might and ought to have done by calling him as a witness; and, therefore, that the evidence offered by him was not sufficient to support the particulars of set-off as to this item. The learned Judge, however, left it to the Jury to say, whether *Mann* had been paid for the flour; and he stated that, if he had, it would reduce the plaintiff's claim on the defendant to four shillings only, as he had supplied the plaintiff with provisions, and made several payments on his account. The Jury found that *Mann* had been paid for the flour, and returned a verdict for the defendant.

Mr. Serjeant *Storks*, in the last term, obtained a rule *nisi*, that this verdict might be set aside, and a new trial granted, on the grounds, that the defendant had failed to prove his particulars of set-off with respect to the flour, as he did not shew that he had paid *Mann* for it. But, even if that item had been allowed, the plaintiff was entitled to recover four shillings from the defendant, as that sum was proved to be due on the balance of accounts between the parties. The verdict, therefore, was contrary to evidence, and against the rules of arithmetic.

Mr. Serjeant *Wilde* and Mr. Serjeant *Goulburn* now shewed cause.—As the objection to the want of sufficient proof by the defendant as to the payment by him to *Mann* for the flour in question, was not raised until after the Judge had begun to sum up to the Jury, it was clearly too late; and the Court will not now infer that the verdict is wrong, or that they came to an improper conclusion from all the facts before them. There can be no doubt but that the flour was supplied by *Mann* to the plaintiff, and that he had not paid for it; and when his wife directed *Mann* to apply to the defendant, and no de-

mand had been since made on the plaintiff, it is *prima facie* evidence that the defendant had paid *Mann* for it. At all events, the verdict is not so clearly wrong as to induce the Court to grant a new trial, particularly, as the sum in dispute between the parties is so small, namely, four shillings. In *Mauricet v. Brecknock* (a), the Court refused to set aside a verdict in an action for a tort, although it was evidently wrong, on account of the smallness of the damages; and in *Tidd's Practice* it is said (b), that it is a general rule not to grant a new trial in a hard or trifling action, after a verdict for the defendant.

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Mr. Serjeant *Storks*, in support of his rule.—The defendant's particulars of set-off were confined to various items alleged to have been paid by him on the plaintiff's account; but he offered no evidence to shew that he had paid *Mann* for the flour in question. The plaintiff, therefore, was still liable to him, and *Mann* should have been called by the defendant. The mere proof of the delivery of the flour to the plaintiff was not sufficient, as the defendant's particulars of set-off were limited to sums paid on the plaintiff's account; and, in *Holland v. Hopkins* (c), where a bill of particulars stated the plaintiff's demand to be for goods sold and delivered to the defendant, it was held that no evidence could be received of goods sold by the defendant as agent for the plaintiff.

Lord Chief Justice TINDAL.—This was an action by the plaintiff, a schoolmaster, by which he sought to recover from the defendant the sum of 31*l.*, for the board and education of two of his sons. The defendant contended that he was not liable, as he had made various payments on the plaintiff's account. He therefore pleaded

(a) 2 Dong. 509.

(b) 9th Edit. 910.

(c) 2 Bos. & Pul. 243.

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a set-off, and afterwards furnished the plaintiff with the particular items constituting such set-off; and it has been admitted, that, if the evidence as to the payment of the flour to *Mann* be sufficient, it reduces the plaintiff's claim on the defendant to the sum of four shillings only. It is a well-known and long established rule, and which was introduced for the benefit of all parties to a suit, that, where the sum in dispute is of a trifling nature, the Court will not grant a new trial, unless the verdict be perverse, or there has been a palpable misdirection by the Judge; and this rule applies to a case where a verdict has been found for the defendant, as well as for the plaintiff. But it has been objected for the plaintiff in this case, that the defendant failed to prove that he had paid *Mann* for the flour in question, and, therefore, that this particular of set-off with respect to that item, could not be supported. There can be no doubt but that the flour was furnished by *Mann* to the plaintiff, and that he had the benefit of it, and that *Mann* looked to the defendant for payment. What are the facts the defendant proved in regard to the flour? It appears, that, after the plaintiff received it, *Mann* sent him in a bill for the amount, when his wife said that it was a mistake, and that he, *Mann*, must look to the defendant. Although it has been objected, on the part of the plaintiff, that it was not sufficient for the defendant to prove the delivery of the flour by *Mann* to the plaintiff, and that he ought to have been precluded from so doing, as the particulars of set-off were confined to payments made by the defendant on the plaintiff's account; yet the objection should have been made at the trial in the first instance, and the plaintiff's counsel ought not to have lain by till all the evidence which the defendant offered in support of his set-off had been heard; and it appears that no objection was taken till after the Judge had begun to sum up the evidence to the Jury. That appears to me to have been too late, and no injustice will follow from the verdict for the defendant, because it is clear that

Mann cannot now charge the plaintiff with the amount of the flour. It is an act of mercy to both parties not to let this case go down again. I therefore think that the verdict ought not to be disturbed.

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Mr. Justice PARK.—I fully concur with my Lord Chief Justice, that the objection to the insufficiency of the proof offered by the defendant in support of his particulars of set-off, with respect to the flour in question, should have been made either when the particulars were put in, or, at all events, when the defendant had closed his evidence; but the subject was not even adverted to, until after the learned Judge had commenced summing up the whole of the evidence to the Jury on the merits. I also think, that we ought not to grant a new trial, as it has been frequently decided in this Court, that where the sum sought to be recovered is under 20*l.*, the action is considered so trifling as to prevent the Court from granting a new trial after a verdict for the defendant; and that rule applies to all cases, unless the verdict is clearly perverse, or there has been a palpable misdirection by the Judge to the Jury.

Mr. Justice BOSANQUET.—I also think that there is no ground to disturb the verdict for the defendant. Under the plea of set-off, he might have given evidence of goods sold to the plaintiff, or of sums paid by the defendant on his account; and although the particulars of set-off were confined to payments made by the defendant, yet the objection should have been taken earlier, and before the Judge began to sum up the evidence to the Jury.

Mr. Justice GASELEE.—I left it to the Jury to say, whether, from the facts before them, they might not presume that *Mann* had been paid for the flour which he supplied

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to the plaintiff. One of the witnesses said that *Mann* told him he had been paid for it. The Jury, therefore, were warranted in assuming that he had been paid by the defendant; and I thought that the objection by the plaintiff's counsel was taken too late, and my opinion is now fortified by the Court. This rule, therefore, must be—

Discharged.

Tuesday,
May 24th.

The lay days allowed by a charter-party for discharging a cargo, are to be reckoned from the time of the ship's arrival at the usual place of discharge, and not at the entrance of the port to which she is chartered, and this although part of the cargo was taken out, for the purpose of lightening the vessel after she had entered the port, and before her arrival at the quay, which, by the custom of the port, was the usual place of delivery.—*Quære*, whether the master of a vessel, having entered a port, is bound to proceed to the ultimate place for discharging her cargo on a Sunday?

BREKTON and Another v. CHAPMAN.

THIS was an action of *assumpsit* on a charter-party. The first count of the declaration stated, that, on the 23rd October, 1829, in parts beyond the seas, to wit, at *Hamburgh*, by a certain charter-party of affreightment, then and there made, it was agreed between the plaintiffs, by one *Doyle Custance*, their agent in that behalf, therein described as Captain *Custance*, master of the ship or vessel called the *Gough* of *Blackney*, then lying at *Hamburgh*, and Messrs. *Gibbons & Hesse* of *Hamburgh*, merchants, that the ship being tight, &c. should, with all convenient speed, sail and proceed to *Wells* (*Norfolk*), after having taken on board 100 tons of oil cakes; and, being so loaded, should therewith proceed to the port of *Wells*, as before, or so near thereunto as she could safely get, and there deliver the same to the freighters, or their assigns, they paying freight for the same at the rate of 10s. sterling, and ten per cent. primage for each *English* ton of oil cakes delivered, with no charges for pilotage and port charges during the voyage. Fourteen running days being allowed for loading and discharging the oil cakes:—and the freight—

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ers to have the option of keeping the ship eight days on demurrage, over and above the said laying days, at 5*l.* sterling *per* day. The plaintiffs then averred, that the vessel having taken her cargo on board at *Hamburg*, proceeded to *Wells*, and that she arrived at that port on the 16th *November*, 1829, with the oil cakes on board, whereof the freighters had notice; and that the plaintiffs were then and there ready to deliver the same to the freighters or their assigns, according to the terms of the charter-party. That the freighters assigned the cargo to the defendant, but that he would not, within the number of days allowed by the charter-party in that behalf, load and discharge the cargo; but, on the contrary, kept and detained the ship at *Wells*, over and above the said fourteen running laying days and the said eight demurrage days, for a long time, to wit, for the space of ten days, whereby the plaintiffs were put to great expense in maintaining the master and mariners, &c., &c. To this were added general counts for freight, prime, average, and demurrage, and the usual money counts. The defendant pleaded the general issue, and a plea of set-off for money paid for lighterage, &c., &c.; and he also paid 40*l.* into Court, to cover the balance alleged to be due to the plaintiffs, which included the sum of 10*l.* for two days' demurrage, the plaintiffs having claimed for ten days.

At the trial, before Mr. Justice *Gaselee*, at the last assizes at *Thetford*, it appeared that eight of the running or laying days for loading the cargo expired at *Hamburg*. That the vessel arrived in that part of the *Channel* called the *Ran*, which is the entrance from the sea to the port of *Wells*, in the forenoon of *Monday*, the 16th *November*, 1829. That *Wells* is a dry harbour at low water, and that the quay is about two miles distant from the sea or entrance to the port. That on the 17th the Captain reported the vessel, and told the defendant that she was aground in the *Ran*, and in an unsafe situation; and that it was necessary that a lighter should be sent down, in order

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that, by taking out a part of the cargo, she might get up to the quay. That on the 18th, 19th, and 26th, several tons of the cargo were removed into two lighters, as the vessel drew too much water to proceed with her entire cargo. It also appeared that the vessel might have got up to the quay on *Sunday*, the 22nd *November*, there being a fair wind and favourable tide, but that the master and crew were on shore; and that she did not arrive at the quay until the 27th; and that the unloading of the cargo was completed on the 4th *December* following.

For the defendant, several respectable merchants residing at *Wells* were called, who proved, that, by the long established and uniform custom of that port, the lay-days for unloading do not begin to run until the arrival of the vessel at the quay; that being the usual and proper place of delivery. The learned Judge left it to the Jury to say, whether the vessel might have got up to the quay on *Sunday*, the 22nd *November*. They found that she might, but also found, that, by the custom of the port of *Wells*, the lay-days are never reckoned until a vessel gets up to the quay, that being the proper place of delivery. The defendant having proved disbursements made by him on account of lighterage and other charges; and shewn that the sum paid into Court was sufficient to cover the plaintiffs' demand in case they could only be entitled to two days' demurrage, a verdict was taken for them;—leave being reserved to the defendant to move to set it aside, and that a verdict might be entered for him, in case the Court should be of opinion, that the plaintiffs were, under the circumstances, only entitled to two days' demurrage, which was covered by the sum paid into Court.

Mr. Serjeant *Wilde*, in the last Term, obtained a rule *nisi* accordingly, and submitted, that, as by the terms of the charter-party, fourteen running days were allowed for loading and discharging the cargo, eight of which expired

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at *Hamburgh*, and the unloading the vessel was completed in eight days, including the day on which she got to the quay at *Wells*, viz. from the 27th *November* to the 4th *December*; making in the whole sixteen days, two days' demurrage only could be due to the plaintiffs, and which was covered by the sum which the defendant had paid into Court. Besides, the Jury found that the vessel might have got up to the quay on *Sunday* the 22nd *November*, had the master and crew been on board; the delay, therefore, could not be attributed to the defendant; neither could the plaintiffs be entitled to claim demurrage beyond the two days, as, by the custom of the port of *Wells*, the lay-days for discharging the cargo were to be reckoned from the time the vessel got to the quay, and not from her entrance into the port, or during the time she might remain in the *Run*.

Mr. Serjeant *Storks* now shewed cause.—The only question is, whether, under the circumstances of this case, the plaintiffs are entitled to claim against the defendant more than two days' demurrage, the unloading of the vessel at the quay at *Wells* not having been completed until the 4th of *December*, she having entered that port on the 16th *November* preceding, and begun to remove her cargo into lighters on the 18th. The vessel was chartered from *Hamburgh* to the port of *Wells*, or so near thereto as she could safely get. The lay-days for unloading the cargo could not exceed six, eight having been exhausted in putting it on board at *Hamburgh*; and, by the charter-party, only fourteen running days were allowed for loading and discharging the cargo. The lay-days for unloading must be calculated either from the time of the ship's arrival at the entrance of the port of *Wells*, or, at furthest, from the day of her beginning to discharge part of her cargo, viz. on the 18th *November*, so that the plaintiffs would be entitled to ten days' demurrage instead of two, and which they

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claimed as being due to them from the defendant before the commencement of the present action. The plaintiffs, in all probability, were not aware of the custom of the port of *Wells*, and, therefore, they ought not to be bound by it; and, in ordinary acceptation, arrival at a port is when a vessel is reported inwards. Where a charter-party contains a stipulation as to the number of lay-days to be allowed for loading and unloading a cargo, it must be construed strictly. So, in the case of demurrage, the freighter is liable for every species of delay, although it may be inevitable, and not attributable to any fault or neglect of his; for a person who hires a vessel must be considered as detaining her, if, at the end of the stipulated time, he does not restore her to the owner; and he is responsible for all the various vicissitudes which may prevent him from so doing. In *Hill v. Idle* (a), the consignee was held liable for the delay occasioned by the necessity of an application to the *Treasury* for a licence to land particular goods, although he used the utmost diligence to procure such licence. In *Leer v. Yates* (b), a necessary delay, occasioned by the crowded state of the *London Docks*, and from the goods being the under part of the cargo, was held not to excuse the several freighters, where there had been no default by the master, from the payment of the stipulated demurrage. In *Harman v. Gandolph*, Lord Chief Justice *Gibbs* said (c)—“The consignee undertakes to clear away his goods within a certain time; and, although by the default of others he is prevented from so doing, he is liable, notwithstanding, to demurrage, by the terms of the contract, unless the delay be occasioned by the default of the captain or his crew;” and, in *Barret v. Dutton* (d), a detention in port, by the vessel’s being frozen up, was held to be no exemption from the claim for demurrage; and Lord Chief Justice *Gibbs* said—“There was an absolute un-

(a) 4 Camp. 327.

(b) 3 Taunt. 387.

(c) Holt’s Ni. Pri. Cas. 38.

(d) 4 Camp. 333.

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dertaking by the freighter to load and discharge the ship in thirty days; and whether it was or was not possible for him to do so from the state of the weather, is quite immaterial." Here, however, the ship was delayed from getting up to the quay by the act of the freighters, as she was so heavily laden; and, according to the language of the charter-party, she had arrived at the port of *Wells* when she entered the *Run* or mouth of that port; and although it has been said that the vessel might have got up to the quay on *Sunday* the 22nd of *November*, if the captain and crew had not been absent, yet it was not their duty to be on board on that day; and even if they had, they would not have been bound to work the ship, as they ought not to pursue their ordinary calling on the Lord's day. In *Fennell v. Ridler*, Mr. Justice *Bayley*, in delivering the judgment of the Court, said (a)—"That one of the provisions of the statute 29 *Car.* 1, c. 7, (an act for the better observation of *Sunday*), is, that no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's day, or any part thereof, works of necessity and charity only excepted; and that the statute must be so construed as to check the career of worldly traffic." In *Cochran v. Retberg* (b), where there was a clause in a bill of lading, that the cargo should be taken out in a certain number of days, or to pay demurrage, Lord Chief Justice *Eldon* was of opinion that the word "days" meant working days, and, therefore, that *Sundays* and holidays should be excluded. Although, in *Constable v. Noble* (c), and *Payne v. Hutchinson* (d), it was decided, that where a town and port are of the same name, an insurance, unless warranted by usage, is applicable to the town, and not to the port and its dependencies; yet here, the vessel was within the limits of the port when

(a) 5 Barn. & Cress. 406

(c) 2 Taunt. 403.

(b) 3 Esp. Rep. 121.

(d) 2 Taunt. 405, n.

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she began to discharge her cargo, and it was not a work of necessity to work her up to the quay on a *Sunday*.

Mr. Serjeant *Wilde* and Mr. Serjeant *Jones*, in support of the rule.—By the terms of the charter-party, the vessel was to proceed to the port of *Wells*, and there deliver her cargo. That must mean the usual place of delivery within the port; and it must be assumed that the plaintiffs were cognizant of the custom of the port, as there was no stipulation to the contrary; and the contract must be construed with reference to the custom of the port to which the vessel is destined. Although a portion of the cargo was removed before her arrival at the quay, yet it was not a discharge or delivery of it, as it was taken out for the purpose of lightening the vessel. In the cases which have been relied on for the plaintiffs, the vessels had not only arrived, but were placed in the proper place of delivery, as in the *West India* or the *London Docks*. The port of *London* extends from *London Bridge* to *Gravesend*, and the word ‘port,’ in mercantile acceptance, if introduced in a charter-party or policy of assurance, with reference to the unloading of a vessel, must be taken to apply to the usual and ordinary place of unloading in that port. In *Abbott on Shipping* (a), it is said—“The manner of delivering the goods, and consequently the period at which the responsibility of the master and owners will cease, depend upon the custom of the particular places, and the usage of particular trades.” The question then is, when did this ship arrive at the port of *Wells* for the purpose of delivering her cargo? Clearly not until she got up to the quay, and from which period the lay-days must be calculated. Therefore, the computation made by the defendant was correct, and he paid a sufficient sum into Court to cover the two extra days which were employed in discharging the cargo. The contract between the par-

(a) 5th edit. 249.

ties must be governed by the usage of the port of *Wells*; and the custom has been expressly found by the Jury, namely, that the lay-days for unloading or discharging a cargo, do not begin to run until the vessel arrives at the quay of that port.

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Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court, as follows:—

By the terms of the charter-party, the ship was to proceed to the port of *Wells*, or so near thereto as she could safely get. Fourteen running days were allowed for loading and discharging the cargo. Eight of these days were consumed at *Hamburgh*, and if we calculate from the 27th of *November*, when the vessel arrived at the quay at *Wells*, for the purpose of unloading the remainder of her cargo, only six days remained; but the defendant having employed eight days there, he paid the amount of two days' demurrage into Court. The only question then is, when the lay-days began, *viz.* whether they are to be reckoned from the time of the arrival of the vessel at the quay, being the place where it was usual to unload, or from the time when she arrived at the entrance of the port of *Wells*? We think that the lay-days ought to be computed from the time of the ship's arrival at the usual place of discharge, and not at the entrance of the port; for, if such days were to be calculated before the vessel arrived at the usual place of delivery, or where the unloading of the cargo commences, the inconvenience would be very great in several instances, *viz.* in the port of *London*, which extends to *Yantlet* creek, which is beyond the mouth of the *Medway*. So, the port of *Hull* extends from the town throughout the whole of the *Humber*, a distance of several miles; and here, the Jury have found, that the lay-days for unloading do not begin to run until the vessel arrives at the quay at *Wells*, which is conformable to the custom of that port. In the cases to which we have been referred, the vessels had arrived

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at the usual places of discharge, as in *Leer v. Yates*, where the ship had arrived at the *London Docks*. We therefore think, that the mode of calculation adopted by the defendant in this case is correct, *viz.* that the lay-days for unloading must be calculated from the 27th of *November*, being the day on which the vessel arrived at the quay at *Wells*. The rule for entering a verdict for the defendant must, therefore, be made—

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The plaintiff declared, that, in consideration that he, at the request of the defendant, would deliver to the defendant a horse of the plaintiff in exchange for a mare of the defendant and 10*l.*, the defendant undertook that his mare was sound. Breach—that she was not sound. The plaintiff's witnesses proved that he did not warrant his horse to be sound, and that the defendant's mare was unsound. The defendant produced a receipt

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THIS was an action of *assumpsit* for a breach of a warranty of the defendant's mare, which he had given in exchange for a colt or horse of the plaintiff. The first count of the declaration stated, that on the 21st *May*, 1830, a mare of the defendant had been standing at certain livery stables kept by one *Osborne*, and had been seen there by the plaintiff on that day; and that, on the 3rd of *August* following, in consideration that the plaintiff, at the special instance and request of the defendant, would deliver to the defendant a certain colt or horse of the plaintiff in exchange for the said mare of the defendant, together with the sum of 10*l.* to be paid by the defendant to the plaintiff, the defendant undertook and faithfully promised the plaintiff, that his, the defendant's mare, was as fresh as when she was at *Osborne's*, except that she might have a little more flesh, having been turned out to grass; and that she was in as good condition as when the plaintiff saw her at *Os-*

to the following effect, signed by the plaintiff (a horse dealer and illiterate man) with his mark:—"Received of the defendant 10*l.* for a colt, warranted sound in every respect." This receipt was given at the suggestion of the defendant's coachman, on the day following the bargain for the exchange, when the defendant sent him to pay the plaintiff 10*l.*:—*Held*, that the receipt was not conclusive to shew that the plaintiff had warranted his horse; and that it was properly left to the Jury to say, whether he had done so or not at the time of the original bargain for the exchange, or whether the warranty of the horse had not been introduced into the receipt by an after-thought of the defendant's coachman; and the Jury having found a verdict for the plaintiff, the Court refused to grant a new trial, which was applied for on the ground of a variance between the terms of the receipt and the consideration for the exchange of the horse and mare, as laid in the declaration.

borne's, and was perfectly sound. The plaintiff then averred, that he delivered his horse in exchange for the defendant's mare and the said sum of 10*l.*, and that he took her into his custody with an intent to keep her, but that at the time of the defendant's promise, the mare was weak and emaciated, and sorely diseased with the mange and divers other diseases and disorders, and was in much worse condition than when the plaintiff saw her at *Osborne's*, and was wholly unsound, whereby she was of no use or value to the plaintiff. There were several other counts, in all of which it was averred, that, in consideration that the plaintiff would deliver a certain horse of his to the defendant, he, the defendant, undertook that his mare was sound.

At the trial, before Lord Chief Justice *Tindal*, at *Westminster*, at the Sittings after the last Term, it appeared, that the plaintiff was a horse-dealer, and that the defendant was a gentleman of fortune. For the plaintiff, two witnesses were called, who proved that they were present on the 3rd *August*, and heard a conversation between the plaintiff and the defendant as to the terms of the exchange of a mare of the latter for a colt of the former. That the defendant then saw the colt, and warranted his mare to be sound; but that the plaintiff did not warrant his colt, and that it was ultimately agreed that the defendant should give his mare and 10*l.* to the plaintiff, in exchange for his colt. It was also proved that the mare had the mange at the time of the bargain, which several veterinary surgeons said amounted to an unsoundness.

It appeared, however, that, on the morning of the 4th *August*, the defendant sent his coachman to the plaintiff with the 10*l.* which the latter was to receive in addition to the defendant's mare. That the coachman went with the plaintiff to a public house, where the publican, at the suggestion of the coachman, wrote the following receipt,

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to which the plaintiff subscribed his mark, he being unable to write his name.

“Received, *August* 4th, 1830, of Mr. *Budd*, 10*l.* for a grey four-years old colt, warranted sound in every respect.”

For the defendant, several witnesses were called, who stated that the mare was not unsound at the time of the exchange, and that the plaintiff's colt was only three years old, and of little or no value. Upon the above receipt being given in evidence, it was objected for the defendant that the plaintiff could not be entitled to recover, as it was stated, in all the counts of the declaration, that the consideration for the defendant's promise moved from the plaintiff, *viz.* a delivery of his horse in exchange for the defendant's mare, and was a general and unqualified allegation; whereas, it appeared on the face of the receipt, that the plaintiff's colt was *warranted sound* in every respect, of which no mention was made in the declaration. As, therefore, both the horse and mare were warranted to be sound, the entire consideration for the defendant's promise was not stated, *viz.* that the plaintiff's colt was sound at the time of the exchange for the defendant's mare, and 10*l.*, which the plaintiff acknowledged to have received. His Lordship, however, left it to the Jury to say, whether, from the testimony of the plaintiff's witnesses, he had warranted his colt at the time of the bargain for the exchange on the 3rd of *August*, or whether the words, “warranted sound in every respect,” might not have been introduced into the receipt by an after-thought of the defendant's coachman, when he paid the plaintiff the 10*l.* on the following morning. The Jury found that the defendant's mare was unsound at the time of the exchange, and that the plaintiff had not warranted his colt, and they returned a verdict for him accordingly.

Mr. Serjeant *Spankie* now applied for a rule *nisi* that this verdict might be set aside and a new trial had, on the objection taken at the trial, and also on the ground of a misdirection by his Lordship to the Jury. The witnesses for the plaintiff did not prove the whole of the terms of the contract, but merely said that they were present at a conversation respecting the exchange of the defendant's mare for the plaintiff's colt, which might only have consisted of a detached part of the bargain. It must be assumed, that a more specific negotiation was ultimately entered into; and the receipt is the best, if not conclusive evidence to shew the terms of the contract on the part of the plaintiff. It was not the mere delivery of his colt to the defendant in exchange for his mare, as alleged in the declaration, for, according to the receipt, the colt was warranted sound in every respect. It was a mutual contract or warranty of both the horses; and the giving the receipt cannot be considered as a separate transaction, but as being connected with the terms of the bargain on the preceding day, and was the best evidence of it from the commencement. Although it might not have the effect of setting up the whole of the terms of the contract, yet it supplied what the plaintiff failed to prove, namely, that his colt was warranted, as well as the defendant's mare: therefore, the entire consideration for the defendant's promise was not set out in the declaration; and the case of *Clarke v. Gray* (a) has established the principle, that where a plaintiff declares for a breach of a contract not under seal, the entire consideration for the act, and the entire act which is to be done in virtue of such consideration, must be stated; and that no part of the entire consideration for the defendant's promise can be omitted; and here, the plaintiff merely averred that he delivered his horse in exchange for the defendant's mare and the sum of 10*l.*, without alleging that the horse was sound. At all events, it should have

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(a) 6 East, 564.

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been left to the Jury to say whether the plaintiff had warranted his horse, as, until the bargain was finally concluded, the terms of the antecedent part of the contract might have been altered or reviewed; whereas, it was left to them to determine whether, from the parol testimony of the plaintiff's witnesses, the plaintiff had warranted his colt at the time of the conversation between him and the defendant, as to the terms on which the horses were to be exchanged, or whether the warranty of the colt was not introduced into the receipt by an after-thought of the defendant's coachman, at whose suggestion the instrument was drawn up.

Lord Chief Justice TINDAL, —I have no wish to shake or impugn the principle established in *Clarke v. Gray*, viz. that, in an action for a breach of contract not under seal, it is necessary for the plaintiff to state in his declaration the entire consideration for the defendant's promise, because, unless the entire consideration be stated, the Court cannot arrive at, or ascertain, the true construction of the contract, or the intention of the parties at the time it was entered into. The question then is, whether, from the evidence adduced at the trial, the whole of the consideration for the defendant's promise is stated or properly described in the declaration. It appears, that, on the 3rd of *August*, the plaintiff and defendant met for the purpose of negotiating an exchange of a colt or horse of the plaintiff for a mare of the defendant; and the plaintiff's witnesses proved that it was ultimately agreed between him and the defendant, on that day, that the plaintiff would deliver his colt to the defendant in exchange for his mare together with the sum of 10*l.*, provided the mare were in as good condition as when the plaintiff had seen her on a former occasion at *Osborne's* stables. That was the whole of the contract, and there was no proof of any warranty of the plaintiff's colt upon that day. It appeared, however,

that on the following morning the defendant's coachman went with the plaintiff to a public house; that the publican, at the suggestion of the coachman, wrote or drew up a receipt, which the plaintiff, an illiterate man, signed with his mark; upon which the coachman paid him 10*l.*, being the sum agreed on between the plaintiff and the defendant on the previous day. The receipt stated that the plaintiff had received of the defendant 10*l.* for a grey four-years old colt, warranted sound in every respect; and the question is, whether that receipt was drawn up according to the real contract between the parties on the preceding day. It appeared to me, that it was not, and the testimony of the plaintiff's witnesses is at variance with such a supposition. The plaintiff and defendant met for the purpose of exchanging horses; and as the plaintiff did not then warrant his colt to be sound, as the receipt imports, it is not only at variance with the terms of the original bargain, but might have been introduced by an after-thought of the defendant's coachman. As, however, there was a manifest disparity between the form of the receipt and the terms of the contract as proved between the plaintiff and the defendant on the preceding day, I left it to the Jury to say, whether the warranty of the plaintiff's colt formed part of the contract at the time of the original bargain, or whether it was introduced into the receipt by an after-thought of the defendant's coachman. The defendant saw the plaintiff's colt at the time the bargain was made, viz. on the 3rd of *August*, and no doubt examined him, and formed a judgment upon him accordingly; and I think the Jury were warranted in finding that the warranty of the plaintiff's colt, as expressed in the receipt, formed no part of the contract between him and the defendant on the preceding day.

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Mr. Justice GASELEE.—It appears to me that the question was properly left to the Jury; and it was for them to

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determine what the contract between the plaintiff and the defendant really was. It is admitted, that the receipt is not conclusive evidence of the contract; and whether the warranty of the plaintiff's colt had been introduced *bond fide*, or by fraud, might be inquired into by parol; and the mode by which it was inserted was shewn at the trial. The sum of 10*l*. was not received of the defendant as the price of the colt, but was given for it together with the defendant's mare. Besides, the receipt was not drawn up by the plaintiff, but at the suggestion of the defendant's servant, and the plaintiff put his mark to it, as he could not write his name. As, therefore, the terms of the receipt are in contradiction to the contract as proved on the preceding day, it was for the Jury to say what the real contract between the parties was, and of which they were competent to judge, from the whole of the evidence before them.

Mr. Justice BOSANQUET.—There can be no doubt but that in declaring for a breach of contract not under seal, it is incumbent on the plaintiff to state the whole consideration for the defendant's promise. Although in this case the receipt might be some evidence of the terms of the contract between the plaintiff and the defendant, yet it is not conclusive; and it was for the Jury to determine what the contract really was. They found it to be as proved by the plaintiff's witnesses, *viz.* that he did not warrant his colt to be sound at the time the terms for the exchange were agreed upon. Besides, this is a mere technical objection, and ought not to be encouraged, as there can be no doubt as to the intent and meaning of the parties at the time of the original bargain.

Mr. Justice ALDERSON concurring—

Rule refused.

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HILL v. FEATHERSTONEHAUGH.

THIS was an action by the plaintiff, an attorney, by which he sought to recover from the defendant the sum of 15*l*., for work and labour done by the plaintiff as the defendant's agent, in causing an investigation to be made as to some securities in the funds, on which the defendant had advanced a sum of money. The defendant pleaded the general issue, and paid five guineas into Court.

At the trial, before Lord Chief Justice *Tindal*, at *Westminster*, at the Sittings after the last term, it appeared, that, in *August*, 1828, the defendant, who resided at *Worcester*, advanced 900*l*. to one *Taylor*, he having informed him that he was entitled to 2000*l*. in the Three *per cent.* Consols, under the will of his father, who had lately died. That the defendant lent him the above sum on the security of the said stock; but being afterwards uneasy respecting it, and having some suspicions as to the truth of *Taylor's* statement, he came to town in *January*, 1829, and consulted the plaintiff, and left all the papers relative to the transaction with him, the advance having been made with the sanction and through the medium of the defendant's attorney in the country. The plaintiff, in order to shew that he had been instructed to act for, and been retained by the defendant, produced two letters, written by him and addressed to the plaintiff, the one dated on the 11th, and the other on the 18th *February*, 1829. In the first letter the defendant said—"With respect to *Taylor's* business, I must leave it to your better judgment. Would it not be well to see if the stock be still remaining? I had no idea but that a *distringas* acted as a complete barrier to any one's selling out, you can lodge a fresh *distringas*, and give them notice as you proposed." The second letter contained the following passage:—"From the conversation I had with you in town, that it was possible for a

If an attorney make a useless or unnecessary investigation the subject of a charge on his client, he cannot recover for such charge in an action for work and labour; and the proper question for the consideration of the Jury in such a case is, whether or not the business done by the attorney was necessary for the purposes of his client.

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party to sell stock, though a *distringas* had been lodged, I have been very uncomfortable;" and the defendant concluded, by requesting the plaintiff to do what he considered to be necessary. The plaintiff then proved that he acted on these instructions; that he had an interview with the solicitors of the Bank of *England* upon the subject; that he caused copies to be made of several deeds deposited with him by the defendant; and that he lodged a *distringas* on *Taylor's* stock with the proper officer at the Bank. The plaintiff's bill of charges contained twenty different items, amounting in the whole to 15*l*.

For the defendant, two clerks of the solicitors of the Bank of *England* were called, who stated, that a former *distringas* on *Taylor's* stock had been issued, and duly lodged with the proper officer, who had notice that no part of such stock should be sold or transferred without further directions; and that the second *distringas* issued by the plaintiff was altogether unnecessary, and from which the defendant could have derived no benefit. Upon which it was objected, that the plaintiff could not be entitled to recover, as the business done for the defendant was not necessary, and that the plaintiff's charges were a mere fabrication and imposition on the defendant. His Lordship left it to the Jury to say—*first*, whether the business done by the plaintiff for the defendant was necessary, or useless and unnecessary;—and *secondly*, whether the plaintiff knew, or had the means of knowing, that the first *distringas* had been sued out and lodged at the Bank, when he directed the second *distringas* to be issued; and his Lordship intimated an opinion, that it might be inferred that the plaintiff knew of the first *distringas*, from the passages contained in the defendant's two letters, which the plaintiff had given in evidence in support of his retainer. The Jury found a verdict for the defendant.

Mr. Serjeant *Cross* now applied for a rule *nisi* that this

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verdict might be set aside and a new trial had, on the ground of a misdirection by his Lordship to the Jury. *First*, as the defendant employed the plaintiff as his attorney to transact certain business for him, and to make inquiries as to the nature of a security he had on certain stock in the Bank of *England*, if the plaintiff acted *bond fide* and according to the best of his judgment, he was entitled to charge the defendant for his labour and trouble, although the work done might eventually turn out not to have been necessary, or beneficial to his client. An attorney is only responsible for *crassa negligentia* or a *lata culpa*; and it does not follow that the first *distringas* was in force when the plaintiff caused the second to be issued and lodged at the Bank. At all events, there is nothing to shew a *mala fides* on the part of the plaintiff, or that the expenses were incurred wilfully, or without cause. But *secondly*, although the second *distringas* might have been unnecessary, yet the first should have been given in evidence; and the fact of its existence ought not to have been inferred or assumed from the defendant's correspondence or letters of instruction to the plaintiff. At all events, a copy of it might and ought to have been produced; and the proper question for the Jury was, whether the first writ of *distringas* was in force and operation at the time the second was issued, and that fact could only have been ascertained by the production of the instrument; and as it might have embraced a mixed question of law and of fact, its effect should either have been decided by the Judge, or explained to the Jury.

Lord Chief Justice TINDAL.—In this case I left it to the Jury to consider, whether, from the evidence before them, the business which had been done by the plaintiff was necessary for the purposes of his client, or whether it was useless and unnecessary; and also, whether they could infer from the defendant's letters, which were put in by the plain-

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tiff, that he was aware of a previous *distringas* when he caused the second to be issued. Two objections have been now raised to that direction—*First*, that the utility of the business done for the client was too narrow and limited a ground to rest the plaintiff's charge upon; as, if the business were done for the benefit of the client, he would be bound to pay his employer. And, *secondly*, that, a *distringas* on certain Bank stock having been adverted to in the course of the evidence, I should have required its production, in order to ascertain and determine its effect and operation, and not have assumed its existence from the expressions made use of by the defendant in his letters to the plaintiff. As to the first objection, the question was left to the Jury in the ordinary way in all actions for work and labour, namely, whether the labour had been useful, or of any benefit to the party charged. I have always understood, that if an attorney, through inadvertence or inexperience, makes a useless or unnecessary investigation the subject of a charge on a client, he cannot be entitled to recover for such charge, on the ground of a remuneration or reward for useful labour. This does not appear to be confined to attorneys or members of the legal profession, but to extend to professors of surgery and medicine; for, if a surgeon were to require his patient to undergo an operation which should turn out to have been altogether useless or unnecessary, he could not make it the subject of a pecuniary claim or charge on such patient. So, if we pass on from professions to trades: if a bricklayer bring an action against his employer for work and labour done in building a wall, if he had so erected it, that it would be liable to fall down shortly after its completion, he would not be entitled to recover for such a charge, as the necessity and utility of the work must be looked at and considered, in order to apportion the remuneration to which the builder might be fairly entitled.

With respect to the *second* objection, namely, the production of the first *distringas*, I agree, that when it was mentioned at the trial, if nothing had previously occurred respecting it between the litigant parties, it should have been produced. But it appeared by the correspondence which had taken place between the plaintiff and the defendant, that a former *distringas* had been alluded to, and it appeared to me that the plaintiff had acted with full knowledge of that circumstance; and I left it to the Jury upon the defendant's letters, which were put in by the plaintiff himself, whether they might not infer that the plaintiff had advised the second *distringas* to be issued, he being aware at the time that the first had been sued out. The defendant in his letter to the plaintiff on the 11th *February*, adverts to a previous communication between them as to the operation of the first *distringas*; for he said, that he thought that a *distringas* acted as a complete barrier to a person's selling out, but that the plaintiff could lodge a fresh *distringas* as he proposed; and, in the letter of the 18th *February*, the defendant refers to a previous conversation he had had with the plaintiff as to the possibility for a party to sell stock after a *distringas* had been lodged. These letters appeared to me to be almost conclusive to shew that the issuing of the second *distringas* originated with the plaintiff himself, and that he had advised his client accordingly, although he was aware that a former *distringas* had been issued.

The question then is, whether the second *distringas* was necessary or not. Two of the acting or managing clerks of the solicitors of the Bank of *England* were called as witnesses for the defendant, and they both stated, that, after one *distringas* had been issued, with a notice not to sell or transfer the stock to which it related, a second *distringas* was altogether useless. I therefore left it to the Jury to say, whether the plaintiff knew that the former *distringas*

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had been sued out when he issued the second. He might have ascertained that fact by inquiring at the office of the solicitors of the Bank, and also whether it remained in force; and it appears that he had an interview with them before the second *distringas* was applied for. I think that, under all these circumstances, I could not have left the questions to the Jury in any other terms. I did not attempt to attribute any improper motive to the plaintiff, nor do I now mean to say that any imputation can be cast on his conduct, with regard to the transaction in question.

Mr. Justice GASELEE.—It appears to me, that there is no ground for complaint as to the mode in which the questions in this case were left to the Jury. When a client employs or instructs an attorney to take steps which he thinks may be for his benefit or advantage, he relies upon the judgment of the attorney, and has a right to expect that he will exercise a due and competent degree of skill; but he does not thereby give the attorney an unlimited discretion; and he is not to pursue a course which will be evidently useless to his employer. Here, my Lord Chief Justice left it to the Jury to say, whether, under all the circumstances, the steps taken by the plaintiff were for the benefit of his client, (the defendant), or whether they were necessary for the accomplishment of the object he had in view, when he consulted with the plaintiff on the subject. As the defendant paid five guineas into Court, the Jury might have considered that it was a sufficient remuneration for the plaintiff's labour; and it is not only fair to presume, but the letters of the defendant import upon the face of them, that the plaintiff must have known that the first *distringas* had been issued, when he advised the second to be sued out; and the question, whether such second *distringas* was necessary or not, was in terms left to the Jury, and the evidence of the clerks of the solicitors of the Bank was

conclusive to shew, that it was not only unnecessary, but altogether useless.

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Mr. Justice BOSANQUET.—I do not see any sufficient ground to induce the Court to grant a new trial. The action was brought by the plaintiff, an attorney, to recover the sum of 15*l.*, and the defendant paid five guineas into Court. As, therefore, in the case of a second trial, the plaintiff could not seek to recover damages to the amount of 20*l.*, the verdict for the defendant ought not to be disturbed, unless there had been a misdirection by my Lord Chief Justice to the Jury. Now, I am of opinion, that both questions were properly left to them. With respect to the first objection, as to whether the business done by the plaintiff was of any use or benefit to the defendant—when a client employs an attorney, he expects that he will exercise a competent degree of professional skill and judgment; and whether the plaintiff had done so in this case, was a question for the Jury; and I see no ground for impeaching their decision. With regard to the alleged insufficiency of the proof of the first *distringas*, its existence was shewn by the defendant's letters, which the plaintiff himself offered in evidence; and when a plaintiff produces a document written by the defendant, and he raises no objection to its being received and read, the plaintiff cannot afterwards complain.

Mr. Justice ALDERSON.—I am of the same opinion. The defendant's letters, which were produced by the plaintiff, shew that the only question between them was, as to the effect, and not the existence of the first *distringas*. The defendant said, that he thought that a *distringas* acted as a complete barrier to a party's selling out, and that the plaintiff could lodge a fresh *distringas* as he proposed. It appears to me, therefore, that the plaintiff was wrong in taking any further steps, particularly, as he might have as-

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certained whether the second *distringas* was necessary or not. In *Duncan v. Blundell*, Mr. Justice Bayley said (a)—“Where a person is employed in a work of skill, the employer buys both his labour and his judgment; he ought not to undertake the work if it cannot succeed; and he should know whether it will or not.” There are two grounds on which a party is entitled to be remunerated or paid for his work and labour; the one, where the work done is useful to his employer, the other, where it has been performed skilfully; and, although in this case the plaintiff might have supposed that the second *distringas* might have been necessary, yet it was proved to be otherwise, and that it was of no service whatever to the defendant. This is not like a case where an attorney is employed by his client to defend an action for him, as the defence would in all probability be beneficial to him whether he succeeded or not. The case put by my Lord Chief Justice of the building of a wall, which might be liable to fall shortly after its erection, appears to me to apply to this case. So, if a wall be improperly built, or placed in such a position that it can be of no service or benefit to the party who employs the builder to erect it, he cannot be entitled to recover for his work and labour (b). Here it appears to me, that both questions were properly left to the Jury, and that they have exercised a sound discretion in finding their verdict for the defendant.

Rule refused.

(a) 3 Stark. Rep. 7.

(b) See *Farnsworth v. Garrard* (1 Camp. 38), which was an action for work and labour for rebuilding the front of a house, and Lord *Ellenborough* said—“I consider this as the correct rule, that if there has been no

beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence.”

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Wednesday,
May 25th.

SEABER the Younger v. HAWKES.

THIS was an action of *assumpsit*, by which the plaintiff sought to recover the sum of 208*l.*, being the amount of one hundred and twenty coombs of wheat alleged to have been sold by him to the defendant. The declaration contained counts for goods bargained and sold, goods sold and delivered, and the common money counts.

At the trial, before Mr. Justice *Alderson*, at the last Assizes at *Bury St. Edmund's*, the defence was, that the defendant had purchased the wheat as the agent of Messrs. *Gibling & Co.*, and on their account. The plaintiff's father stated that he heard the defendant bargain with his son for the wheat, and that it was afterwards put on board a vessel belonging to the defendant. For the defendant, one of the firm of *Gibling & Co.* was called, who stated, that the defendant had been their clerk for the last six years, that he was in their employ at the time of the purchase of the wheat in question, and that he was in the habit of attending different markets, and making purchases of corn and grain on their account.

The learned Judge, in the course of his summing up to the Jury, said, that the question for their consideration was, whether the defendant told the plaintiff that he was acting as the agent of Messrs. *Gibling & Co.* at the time he purchased the wheat. They having found a verdict for the plaintiff for the full amount—

In an action for goods sold and delivered, the question being, whether the contract was made by the defendant as principal or as agent for third persons who employed him to make purchases on their account; and it was left to the Jury to say, whether the defendant told the plaintiff that he was acting as an agent at the time of the purchase:—*Held*, that it was not a misdirection, as it was incumbent on the defendant to shew, either that he told the plaintiff that he made the purchase on account of his principals, or that the plaintiff knew that he was merely acting as their agent.

Mr. Serjeant *Storks*, in the last term, obtained a rule *nisi* that this verdict might be set aside and a new trial had, on the ground of a misdirection by the learned Judge to the Jury. The question which ought to have been submitted to them was, whether the plaintiff knew, or had not reason to believe, that the defendant was acting as the agent of Messrs. *Gibling & Co.*, or, whether he bought

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the wheat on his own account; and, as *Gibling* proved that he was their clerk, and was in the habit of making purchases of grain for them in different markets, the action should have been brought against them; and therefore the present verdict could not be supported.

Mr. Serjeant *Jones* now shewed cause.—Even if the plaintiff had been aware that the defendant was the agent of Messrs. *Gibling*, the action was maintainable against him, unless, at the time of the contract, he had declared that he was making the purchase for them. The plaintiff having proved the sale and delivery of the wheat to the defendant, and there being no evidence that the contract was made with him on account of Messrs. *Gibling*, the plaintiff was entitled to recover; and the substantial question left to the Jury was, with whom the plaintiff was dealing at the time of the sale. The wheat was afterwards delivered to the defendant; and it was, at all events, incumbent upon him to shew that he made the purchase as agent for Messrs. *Gibling*, or that it was received on their account.

Mr. Serjeant *Storks*, and Mr. Serjeant *Bompas* in support of the rule.—It ought to have been left to the Jury to say, whether the plaintiff knew, or had any means of knowing, that the defendant acted as the agent of Messrs. *Gibling*, and not whether the defendant told the plaintiff that he was acting as such at the time of the purchase of the wheat; and one of the firm of Messrs. *Gibling* proved, not only that the defendant had acted as their clerk for six years, but that he was in the habit of making purchases of corn in different markets on their account.

Lord Chief Justice TINDAL.—The only question in this case is, whether the contract for the sale of the wheat in question was made with the defendant in his own indi-

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vidual right, or as the agent of Messrs. *Gibling & Co.* If it were made with him in the latter character, the plaintiff could not be entitled to maintain this action, as his remedy was against Messrs. *Gibling*. But it was incumbent on the defendant to have shewn, either that he informed the plaintiff that he was making the purchase on account of Messrs. *Gibling*, or that it was notorious that he only acted as their agent in the purchase and sale of corn, and not on his own account. But he did not prove that he told the plaintiff that he was contracting for his principals at the time of the purchase of the wheat, neither did it appear that the plaintiff was then aware that the defendant was Messrs. *Gibling's* clerk; and there was no evidence from which the Jury could draw such an inference. Besides, the wheat was delivered and put on board a vessel belonging to the defendant himself; it was therefore but fair to presume, that he bought it on his own account. The defendant did not even disclose the names of Messrs. *Gibling & Co.* to the plaintiff in this particular transaction, and, although he might have purchased corn in different markets, of other persons, for them, it does not follow that the plaintiff knew that he was their agent, or that he was in their employ. The main question left to the Jury was, whether the contract was made by the defendant in his own right, or as agent for Messrs. *Gibling*: and whether the defendant told the plaintiff that he was acting as their agent at the time of the purchase of the wheat, might have had no operation on their minds. I therefore think that there is no ground to disturb the verdict for the plaintiff.

Mr. Justice GASELEE.—The rule for a new trial was applied for on the ground of a misdirection of my Brother *Alderson* to the Jury; but there certainly was evidence from which they might infer that the defendant purchased the wheat on his own account, and not as the agent of Messrs. *Gibling*; and it would be too much for me to say, that they have drawn a wrong conclusion.

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Mr. Justice BOSANQUET.—I am of the same opinion. The question was, whether the plaintiff sold the wheat to the defendant on his own account, or as the agent of Messrs. *Gibling*. That will depend upon two points—*First*, whether the defendant acted as their agent generally, or on all occasions.—And *secondly*, whether the plaintiff was apprized of that fact at the time of the purchase of the wheat; and it appears that it was eventually left to the Jury to say, whether the plaintiff sold the wheat in question to the defendant as the agent of *Gibling & Co.*, or, whether the plaintiff knew that he was their agent.

Mr. Justice ALDERSON.—I should be disposed to grant a new trial in this case, if I thought that the proper question had not been left to the Jury; but I eventually left it to them to say, whether the plaintiff dealt with the defendant as a principal or as the agent of Messrs. *Gibling*. He did not prove that he mentioned their names at the time of the contract, and, if he made it on their account, he should at least have communicated that fact; and there was no evidence to shew that the defendant had ever bought corn of the plaintiff on account of Messrs. *Gibling*. Although I might have said that the question was, whether the defendant told the plaintiff that he was acting as the agent of Messrs. *Gibling*, yet it was a mere incidental remark, and might have had no effect on the minds of the Jury, particularly as there was no evidence to shew that the plaintiff was aware that the defendant acted as the agent of *Gibling & Co.*, or that he was their clerk at the time the contract was made.

Rule discharged.

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REED, ALLEN, and BOWEN v. WILMOTT and Another,
Assignees of HEMENT, a Bankrupt.

Thursday,
May 26th.

THIS was an action for money had and received, by which the plaintiffs sought to recover the sum of 346*l.*, the produce of certain barges and lighters sold by the defendants, and which the plaintiffs alleged to be their property at the time of the sale.

At the trial, before Mr. Justice *Alderson*, at the last Assizes at *Huntingdon*, it appeared that the plaintiff *Reed* was a carpenter, *Allen* a boat wright, and *Bowen* a lighter-man; and that *Hement*, a barge master and lighterman, being indebted to them in three several sums, he, on the 29th *January*, 1830, by a mortgage deed, assigned nine barges or lighters of his to the plaintiffs jointly, by way of security for 365*l.*, stated on the deed to be due from him to them. It also appeared, that the plaintiff *Reed* was a creditor of *Hement* to the amount of 225*l.*; that *Allen* was a creditor for 88*l.* 12*s.*, and *Bowen* for 51*l.* 8*s.*, making together the above sum of 365*l.* On the production of the mortgage deed, it appeared that the barges were assigned by *Hement* to the three plaintiffs jointly, to secure to them, or to the survivors or survivor, their executors and administrators, the payment of the sum of 365*l.*; and the deed was to be void on payment of that sum on the 29th *July*, 1830; but that, in default of payment on that day, it should be lawful for the plaintiffs (the mortgagees) to enter upon and take possession of the barges to their own use; and it was further stipulated, that *Hement* should continue in possession of them from the date of the deed to the day appointed and named for payment of the above sum of 365*l.* The deed was stamped with an ordinary deed stamp, *viz.* 1*l.* 15*s.*, when it was objected for the defendants, that it was not sufficient, as, by the statute 55 *Geo.*

By a mortgage deed, *A.* assigned certain barges to three of his creditors, as a security for three distinct debts due to each in their separate rights. The aggregate amount only was stated in the deed:—*Held*, that an *ad valorem* stamp on such amount is sufficient.

If copyhold premises are mortgaged with other property by separate deeds, the *ad valorem* duty must be charged upon the instrument relating to the other property.

A mortgage of chattels without delivery of possession to the mortgagee is valid, if the mortgagor's continuing in possession is consistent with the terms of the deed.

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3, c. 184, Sched. Part 1, tit. "*Mortgage*," it required an *ad valorem* stamp; and that, as it was given to secure the payment to three different persons of three separate and distinct sums due to each, the duty should have been charged in respect of each separate sum, and not upon the aggregate amount; and, therefore, that the deed should have been stamped with a 6*l.* stamp. But as the deed referred to a deed of surrender out of Court, of certain copyhold premises belonging to *Hement*, and which deed had been given to the plaintiffs as a further security for the above sum of 365*l.*, it was put in for them, when it appeared to have been executed on the same day as the other deed, and to have been impressed with an *ad valorem* stamp of 4*l.* The learned Judge reserved the objection as to the insufficiency of the stamp on the mortgage deed for the opinion of the Court.

For the defendants, a deed of assignment, dated the 4th *February*, 1830, was given in evidence, by which *Hement* assigned the barges and lighters in question, and all his property, to the defendants, in trust for themselves and the rest of his creditors, who, in consideration of such assignment, executed a deed of release to him. It also appeared that *Hement's* name still remained on the barges, and that he used them in the way of his trade the day previously to the assignment to the defendants; and that the plaintiffs had never been in possession, from the time of the alleged mortgage to them, to the day of the sale by the defendants, and which they directed to be made by virtue of the deed of assignment. It was then objected, that the assignment of the barges to the plaintiffs, by way of mortgage, was *ipso facto* void, as they had never taken possession. But the learned Judge told the Jury that it was competent to a debtor to assign his property to a creditor for a valuable consideration; and that the assignment to the plaintiffs was conformable to the clause in the deed,

by which it was stipulated that the mortgagor was to remain in possession till a certain day, when, in default of payment of the principal sum secured by the deed, the plaintiffs, as mortgagees, were to take possession; and he left it to the Jury to say, whether that clause was introduced with a fraudulent or colourable intent, or whether, from the whole of the circumstances, fraud might be inferred. The Jury found that the mortgage of the barges to the plaintiffs was a *bond fide* transaction, and returned a verdict for them accordingly, for 346*l.*, being the sum the defendants had received as the proceeds of the sale.

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Mr. Serjeant *Wilde*, in the last Term, obtained a rule nisi that this verdict might be set aside and a nonsuit entered—*First*, on the ground of the insufficiency of the stamp on the mortgage deed;—and *secondly*, that, as the barges constituted the principal part of *Hement's* property, and he continued in possession from the time of the mortgage to the plaintiffs to the day of the assignment to the defendants, and they had no notice of any change of property, and had, together with the other creditors, executed a deed of release to *Hement* in consideration of such assignment, no property in the barges passed to the plaintiffs, particularly, as *Hement's* name was allowed to remain on them, and he continued to use them as his own. Although, in *Muller v. Moss* (a), where it was agreed that a person might remain in possession of a house for three months without paying rent, and he continued in possession according to the terms of the agreement, and became bankrupt before the three months had expired, it was held, that it was not a possession by the bankrupt within the statute 21 *Jac.* 1, c. 19, yet the agreement was notorious in the neighbourhood, and no person was deceived; whilst

(a) 1 *Mau. & Selw.* 335.

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here, the barges were assigned to the plaintiffs clandestinely and by a private bargain; and the mortgagor was the apparent and visible owner, and was allowed to remain in possession; and an assignment of chattels by way of mortgage without delivery is fraudulent as against *bond fide* creditors who have no notice of the mortgage, although it may have been agreed between the parties that the mortgagor might remain in possession for a stipulated time after the conveyance to the mortgagees.

Mr. Serjeant *Storks* now shewed cause.—It appears, by both the deeds, that they were given to secure to the plaintiffs the aggregate sum of 365*l.*, and, as the deed of surrender was stamped with an *ad valorem* stamp, and charged with a duty sufficient to cover that sum, that instrument was properly stamped. In *Boase v. Jackson* (a), where two separate properties were demised for different terms, and at distinct rents, it was held, that all the premises might be demised by one instrument, and that an *ad valorem* stamp on the aggregate amount was sufficient, there being no evidence of any intention to defraud the revenue; and here, no such intent has been suggested, and the plaintiffs proved that the deeds were founded on a *bond fide* consideration. They were both executed on the same day, and the one was meant to be collateral to the other, and must, therefore, be considered as forming one and the same transaction. In *Davis v. Williams* (b), an agreement by several persons to subscribe to one common fund, although several as to each subscriber, was held to require only one stamp; and, in *Robinson v. Macdonnell* (c), a deed executed and indorsed on a former deed, as a further security for advances made and to be made under the first deed, was held to be exempt from an *ad valorem* duty, if the first deed were stamped with an *ad*

(a) 6 B. Moore, 480. (b) 13 East, 232. (c) 5 Mau. & Selw. 228.

valorem stamp; and here, the deed by which the barges were mortgaged, referred expressly to the deed of surrender, and both instruments were given to secure one and the same sum, namely, 365*l*. Besides, the plaintiffs have no several remedy on either of the deeds, neither had they the benefit of a separate security, for if either of them had died, his personal representatives could only have proceeded in the names of the survivors. One could not have brought a separate action on either of the deeds in his own name, or for the amount of his separate debt; the plaintiffs, therefore, must be considered as joint tenants, and having a joint interest in the aggregate amount or sum specified in each of the deeds. The object of the Legislature was only to require separate stamps, where the several mortgagees had separate remedies on the same deed; and the *ad valorem* duty was to be charged in respect of each separate sum *specified in, and secured by*, the deed. Here, however, one sum only is mentioned, and a joint and not a separate interest is created by the deeds; and, although the plaintiffs might severally have a remedy in equity, yet it is quite clear that they have none at law, as they have no legal security for their distinct and separate debts; and, as one sum only is specified in both the deeds, an *ad valorem* duty, in respect of such aggregate sum, is sufficient; and, in *Baker v. Dewey*, Mr. Justice Bayley said (a)—“A party who executes a deed is estopped in a Court of law from saying that the facts stated in that deed are not truly stated.” There, the deed stated that the consideration for the purchase of certain premises therein mentioned had been well and truly paid; and it was held, that both parties were estopped from saying that *the whole* of the purchase money had not been paid.

With respect to the second objection, that no property in the barges passed to the plaintiffs, as the mortgagor

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(a) 1 Barn. & Cress. 707.

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was allowed to remain in possession until he became bankrupt, yet the Jury found that the whole of the transaction was *bond fide*, and that no fraud was contemplated or intended. Although it is a general rule, that, in the transfer of chattels, the possession must accompany and follow the deed; yet, in *Edwards v. Harben* (a), a distinction was taken, that where the conveyance is absolute, the possession must be delivered immediately, but that where it is conditional, it will not be rendered void by the vendors' continuing in possession till the condition be performed. That is the true principle, and has been invariably acted upon since the decision of that case; and here, the parties expressly stipulated by the deed, that the mortgagor was to remain in possession of the barges until a certain day; and that, if he then made default in payment of the principal sum stated in the deed, the plaintiffs, as mortgagees, were to enter and take possession accordingly.

Mr. Serjeant *Wilde* and Mr. Serjeant *Russell* in support of the rule.—*First*, it is quite clear that neither of the deeds which the plaintiffs produced in evidence was properly stamped: the deed by which the barges were assigned to them was inadmissible, as it was not stamped with an *ad valorem* stamp; and, although it referred to the deed of the surrender of the mortgagor's copyhold property, yet the *ad valorem* duty should have been charged and paid on the former deed, as both instruments were executed at the same time, and for the express purpose of securing one and the same sum of money. The statute 55 Geo. 3, c. 184, Sched. Part 1, tit. "*Mortgage*," provides, that where a deed is made as a security for the payment of any definite and certain sum of money, advanced or lent at the time or previously due

(a) 2 Term Rep. 587.

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and owing, if exceeding 300*l.*, and not exceeding 500*l.*, a duty of 4*l.* shall be payable; yet it is also provided, that "in case the same shall be made as a security for the payment or transfer, to different persons, of separate and distinct sums of money, or shares in any of the government stocks or funds, the *ad valorem* duty shall be charged for and in respect of each separate and distinct sum of money, or share in any of the said stocks or funds therein specified and secured, and not upon the aggregate amount thereof." Here, the plaintiffs had three different and separate claims, for three several debts due to them respectively from the mortgagor. They had no privity of estate, for the debts were due to them individually, and according to their several avocations in trade; and although one sum only is specified in each of the deeds, yet they were given to secure three several sums of different amount, and to three several creditors, for separate and unconnected demands upon their debtor. All statutes which are passed in aid of the revenue must receive a strict construction; and here, the words *therein specified* can only be taken to apply to the last antecedent, namely, stocks or funds, and which, in this case, have reference to the barges which were assigned by way of security, for three separate sums, to three several persons, who each derived a benefit from the securities, and which ought to have been charged and stamped accordingly, *vis.* with the *ad valorem* duty in respect of each distinct sum.

Admitting, that, where one of several deeds, the whole of which relate to and form one and the same transaction, has a proper *ad valorem* stamp impressed upon it, it is sufficient if it expressly refers to the other instruments, yet the denoting stamp must be affixed to the proper deed; and here, the *ad valorem* duty should have been imposed and paid on the mortgage deed, and not on the deed of the surrender; for it is expressly provided by the statute 55 *Geo.* 3, that,

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“where any copyhold or customary lands or hereditaments shall be mortgaged or charged, together with other property, for securing one and the same sum of money, or one and the same share of any of the stocks or funds before mentioned, the said *ad valorem* duty shall be charged on the deed or instrument relating to the other property.” Here, the barges alone were the property which the plaintiffs sought to make available; and the deed by which they were assigned should have been stamped with an *ad valorem* stamp; and therefore the words of the statute are express to shew that neither of the instruments was properly stamped.

[Mr. Serjeant *Storks* interposed, and said, that as the latter objection had not been taken at the trial, or raised when the rule *nisi* for entering a nonsuit was granted, it was now too late for the Court to entertain it.]

As the question as to the sufficiency of the stamp was reserved by the learned Judge, the defendants have a right to raise any objections they may think proper, and at any period before the Court give an ultimate opinion upon the point submitted to their consideration. *Secondly*, at all events, the plaintiffs cannot be entitled to recover the sum the defendants received from the sale of the barges, as no legal property in them passed to the plaintiffs; and although the Jury have negatived fraud, yet, as the plaintiffs' claim is founded on the assignment of the barges to them by virtue of the mortgage deed, and they permitted the mortgagor to retain possession of them, and to hold himself out to the world as the apparent and ostensible owner from the time of the mortgage to the day of the assignment of his property to the defendants, the transfer to the plaintiffs is void as against the creditors of the bankrupt at the time of his bankruptcy. A transfer or mortgage of personal chattels without delivery to the assignee or mortgagee, is void, as being against public policy; and it is al-

so a fraud in law: and the case of *Ryall v. Roll* is an express authority to shew that a mortgage of goods or chattels without possession cannot exist in point of law; and Mr. Justice *Burnet* there said (a), that where the debtor continues in possession of the goods mortgaged, it was fraudulent at common law; and that, the statute 13 *Eliz.* c. 5, provides against it, and enacts, that it shall be void; and there is no distinction whether the sale be absolute or conditional; and that if a conditional vendee pays money, and does not insist upon the delivery of the goods, he confides in the credit of the vendor, and not in any real or particular security.

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Lord Chief Justice TINDAL.—At the trial, the plaintiffs, in order to support their case, produced in evidence a deed or instrument, purporting to be a mortgage of personal property, and by which deed certain barges or lighters were assigned to them as a security for the repayment of 365*l.*, stated to be due to them from *Hement*, the mortgagor.

For the defendants, it was objected, that this deed was improperly stamped, as it had only a common deed stamp impressed upon it, instead of an *ad valorem* stamp, which, it was submitted, was necessary by the statute 55 *Geo.* 3, c. 184, Sched. Part 1. To this objection it was answered, that the deed referred to another, namely, a conveyance of certain copyhold property of the mortgagor, which was transferred to the plaintiffs at the same time with the barges, by a deed of surrender out of Court, as a further security for the aggregate sum of 365*l.*, as expressed in the former deed. On the production of the deed of surrender, it was impressed with an *ad valorem* stamp of 4*l.* It was then objected, that although that deed might be

(a) 1 Atk. 167, 170.

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incorporated with the former, yet, that a single *ad valorem* stamp was not sufficient, as it appeared by the plaintiffs' own shewing, that the object of the deeds was to secure the re-payment of 365*l.* by *Hement* to them, as three different creditors, and in distinct rights, and that there should, consequently, have been an *ad valorem* duty paid, not on the aggregate amount, but in respect of each distinct and separate debt. A verdict was found for the plaintiffs, leave being reserved to the defendants to move to enter a nonsuit, on the ground of the insufficiency of the stamp. The first question then is, whether the *ad valorem* stamp of 4*l.* was a proper stamp, and of sufficient amount. That depends on the language of the statute 55 *Geo. 3, c. 184*, Sched. Part 1, tit. "*Mortgage*," which provides, that "in case the deed shall be made as a security for the payment or transfer to different persons of separate and distinct sums of money or shares in any of the government or parliamentary stocks or funds, the *ad valorem* duty shall be charged for and in respect of each separate and distinct sum of money, or share in any of the said stocks or funds therein specified and secured, and not upon the aggregate amount thereof." Now, it has been said, that as it appears on the face of the deed, that there are three several creditors, and it was proved at the trial that each had a distinct and separate debt due to him from the mortgagor, and which varied in amount, that the deed should have had three several *ad valorem* stamps, according to the amount of each of those debts, which would increase the aggregate amount of the duty to 6*l.* I am of opinion that this objection ought not to prevail, for, according to the statute, in order to render a stamp necessary for each of the separate debts, it should appear on the face of the deed that it was given as a security for the payment of three separate and distinct sums. But the deed in question appears to be a security to three persons

therein named, or to the survivors or survivor of them, their executors, or administrators, for the single sum of 365*l*., and not for three separate and distinct sums. The only criterion or test by which the *ad valorem* duty could be estimated or charged, would be on the aggregate amount, as no separate sum was specified in the deed. Besides, it does not appear to me, that this case falls within the reason or meaning of the statute, the object of which was, to require a separate stamp for each distinct and separate sum secured; but here the three plaintiffs, as creditors of the mortgagor, have not the benefit of a separate security, as neither of them could sue severally, or in his own name;—so, if one of them should happen to die, his right would vest in the survivors, and his representatives must have recourse to a Court of equity, if such survivors would not consent that the suit should proceed in their name. It does not appear, nor has it been suggested, that the parties meant to evade the statute, which, being a revenue law, must be construed strictly with reference to the rights of the subject; and as the plaintiffs' interests were blended, they naturally thought that a security to them jointly for the aggregate amount of their respective debts would be the more preferable security, and the *ad valorem* duty was calculated accordingly. But a further objection has been raised in support of the rule for a nonsuit, *vis.* that the *ad valorem* stamp, if sufficient, has been placed on the wrong deed, *vis.* the deed of the surrender of the copyhold, whereas it should have been charged and paid on the mortgage deed, by which the barges were assigned to the plaintiffs, and which form the subject matter of this action; and we have been referred to a clause in the statute, which expressly provides, “that where any copyhold or customary lands or hereditaments shall be mortgaged or charged together with other property, for securing one and the same sum of money, or one and the same share of any of the stocks or funds before mentioned, the *ad va-*

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lorem duty shall be charged on the deed or instrument relating to the other property." We cannot relieve the plaintiffs from the difficulty in which they are placed by this clause, the words of which are express and direct. The mortgage deed, therefore, ought to have had the *ad valorem* stamp affixed to it; and although the objection that it was improperly impressed on the deed of surrender was not taken at the trial, yet the defendant's counsel was not then bound to go through all the clauses of the act. But it is much to be regretted that the above provision was not referred to, as it would have saved the parties a considerable expense; for there can be no doubt but that the plaintiffs would have been nonsuited. On the whole, therefore, the justice of the case appears to me to be, that, upon payment of the costs of the former trial by the plaintiffs, they should be entitled to a new trial.

Mr. Justice PARK.—I abstain from giving any opinion as to the objections which have been raised with regard to the deeds being properly stamped, as I was not in Court during that part of the argument. But, as to the question whether the plaintiffs had a legal property in the barges by the mortgage to them, the case of *Edwards v. Harben* appears to me to be precisely in point, and its authority has never been questioned or doubted. Mr. Justice Buller, in delivering a most elaborate judgment, there said—"So long ago as the case in *Bulstrode* (*viz.* that of *Stone v. Grubham* (a), which was decided in the time of Charles the Second), the Court held, that an *absolute conveyance* or gift of a lease for years, unattended with possession, was fraudulent; but if the deed or conveyance be conditional, there, the vendor's continuing in possession does not avoid it, because, by the terms of the conveyance, the vendee is not to have the possession till he has performed the condition; and that that case makes the distinction between

deeds or bills of sale which are to take place immediately, and those which are to take place at some future time; for, in the latter case, the possession continuing in the vendor till that future time, or till that condition is performed, is consistent with the deed; and such possession comes within the rule, as *accompanying* and *following* the deed." That appears to me to be precisely applicable to the present case, as the parties stipulated by the deed that the mortgagor should remain in possession of the barges for six months after the execution of the instrument, when, in default of the payment of the principal sum, the plaintiffs, as mortgagees, were to take possession. That appears to me to be sufficient to shew that there was no fraud contemplated between the parties; besides which, the Jury have expressly negatived fraud, which they were fully warranted in doing from the evidence before them.

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Mr. Justice GASELEE.—The clause in the statute 55 *Geo.* 3, which directs the *ad valorem* duty to be charged in respect of each separate and distinct sum of money, can only apply, where such sums are expressed in the deed; as the words which immediately follow, are "therein specified and secured." The objection, therefore, that the plaintiffs ought not to have taken a security with one stamp only, because their debts were separate, and of different amount, cannot be sustained, as one sum only was mentioned in the deeds; and I am not prepared to say that the omission to specify that the three sums were severally due to the plaintiffs, renders the deed void. In the case of *Doe d. Higginbotham v. Hobson* (a), a deed of conveyance, which omitted truly to set out the whole consideration, directly or indirectly paid, or agreed to be paid, for the estate conveyed, was held not to be void under the statute 48 *Geo.* 3, c. 149, s. 22. There, a lease stated no further consideration than the usual co-

(a) 3 Dow. & Ryl. 186.

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venants to repair; but on the same day it was executed, a warrant of attorney was given by the lessee to the lessor for 3,000*l.*;—and it was submitted for the lessee, that the sum mentioned in the warrant of attorney was indirectly the consideration for the purchase of the lease, and that, not having been set out therein, the lease was void; but Lord Chief Justice *Abbott* said—“Suppose a man buys an estate for one thousand guineas, and the sum put into the deed is one thousand pounds, are we to say that the conveyance would be void, because the sum of one thousand guineas was not inserted.” And Mr. Justice *Holroyd* said—“Even supposing the 3,000*l.* to be the consideration for the lease, still the statute does not make the instrument itself void. It directs that the consideration money shall be truly expressed, but it does not say, that, if it is not expressed, the conveyance shall be void.” I have looked carefully into all the Stamp Acts, and have not been able to find any clause which directs a deed of conveyance, or an assignment by way of mortgage, to be void, if the consideration be not duly stated. It appears to me, however, that the objection, that the *ad valorem* stamp is impressed on the wrong deed, *viz.* the deed of surrender, is well founded, and cannot be got over; and, although it was not necessary for the defendant’s counsel to advert to every clause of the statute at the trial, still it is much to be lamented that the provision in question was not pointed out, as the plaintiffs would, no doubt, have been nonsuited. With respect to the last objection, the case of *Edwards v. Harben* is precisely in point, and by which it was established, that, where there is a *bona fide* conveyance or mortgage of chattels, and the deed contains a condition or stipulation that the vendor or mortgagor may remain in possession for a given period, it does not render the deed void; and here the Jury have found that there was no fraud in the transaction between the plaintiffs and the mortgagor.

Mr. Justice BOSANQUET.—I agree with the rest of the Court. With respect to the first objection, and which was taken at the trial, namely, that the *ad valorem* duty ought to have been charged and paid in respect of the plaintiffs' three several debts, yet it appears to me not to be tenable, as the words of the statute are, that the duty shall be charged in respect of each separate and distinct sum in the deed specified and secured, and here one sum only was mentioned or secured, and the *ad valorem* duty charged and paid was sufficient to cover that sum; and where a statute imposes a burthen on the subject, its construction ought not to be extended. As to the second objection, that the *ad valorem* stamp has been impressed on the wrong deed, it appears to me, that it is unanswerable; but if it had been presented to the attention of the Judge at the trial, he would no doubt have directed a nonsuit. Although it has been further objected, that no property in the barges passed to the plaintiffs, as they never took possession, but allowed the mortgagor to be the ostensible owner; yet, the case of *Edwards v. Harben* has established the principle, that, if the deed of conveyance be conditional, the mortgagor's continuing in possession does not avoid it. That is a leading case, and the authority of it has never been questioned; and it is consistent with the principles of law and of established usage.

The Court directed a new trial on payment by the plaintiffs of the costs of the former trial, and of the application for a nonsuit, within a fortnight;—if not, a nonsuit was to be entered. On these terms—

Rule absolute.

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The 45th section of the statute 6 Geo. 4, c. 16, imposes a penalty on the provisional assignee, if he does not deliver up the bankrupt's estate to the ultimate assignee. The 67th section enacts, that a suit is not to abate by the death of an assignee, but that it may be prosecuted in the name of the new assignee; and by the 100th section, the sum recovered for a penalty under the act is to be divided among the creditors. An assignee having died, and a suggestion of his death entered on the record:—*Held*, that the succeeding assignee was entitled to proceed in a suit which had been commenced by his predecessor against the provisional assignee for a penalty:—*Held*, also, that as the assignment to the provisional assignee was recited in the assignment to the second assignee, it was not incumbent on the plaintiff to produce it in evidence.

BATES, Assignee of MARTIN a Bankrupt, v. STURGES.

THIS was an action of debt, and brought to recover a penalty of 200*l.* from the defendant, as messenger and provisional assignee under a commission of bankrupt which had been issued against *Martin*, for not paying over to the subsequent assignee chosen by the creditors, certain sums of money which the defendant, as such provisional assignee, had received on account of the bankrupt's estate (*a*). The declaration contained counts for money had and received, money paid, and on an account stated.

At the trial, before Lord Chief Justice *Tindal*, at *Guild-hall*, at the Sittings after the last term, it appeared, that the action had been originally commenced by one *Westall*, as assignee of *Martin*; that he died before the defendant put in his plea; and that a suggestion of *Westall's* death had been entered on the roll, pursuant to the statute 6 Geo. 4, c. 16, s. 67 (*b*), and that the suit had been since continued and prosecuted by the plaintiff, who had been duly chosen assignee in the place of *Westall*. The plaintiff put in the deed of assignment to *Westall*, and also the provisional assignment to the defendant, and proved that he, the plaintiff, had been duly chosen assignee after *Westall's* death. But the plaintiff did not shew that the deed of the provisional assignment had been enrolled pursuant to the 96th section of the statute;—upon which it was objected for the defendant, that the plaintiff could not be entitled to recover, as the deed could not be read, and, therefore, that he had failed to prove his title to sue; but the Lord Chief Justice thought, that as the provisional assignment was recited in the deed of assignment to *Westall*, it was not necessary to give the former deed in evidence; and that, as the assignment to *Westall* had been

(*a*) See the statute 6 Geo. 4, c. 16, s. 45.

(*b*) See 4 Moore & Payne, 217.

enrolled, and the plaintiff had proved that he had been chosen assignee in his stead, he was entitled to recover; and the Jury found a verdict for him accordingly.

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Mr. Serjeant *Andrews* now applied for a rule *nisi*, that this verdict might be set aside and a nonsuit entered, on two grounds.—*First*, that, as the plaintiff derived his title to sue the defendant from the provisional assignment made to him in the first instance, and the action was brought to recover a penalty from the defendant, in his character of provisional assignee, the deed of assignment to him should have been enrolled, pursuant to the 96th section of the statute.

[Mr. Justice *Park*.—It was not necessary for the plaintiff to put in that deed, as it was recited in the assignment to *Westall*; and when it was shewn that that deed was enrolled, and that the plaintiff had been chosen to succeed *Westall* as assignee, he proved his title *aliunde*.]

Secondly.—Although the 67th section of the statute empowers a new assignee to prosecute an action in his own name, in the same manner as if he had commenced it; yet it cannot apply to an action brought to recover a penalty; and the Court would not have allowed the suggestion of the death of *Westall* to be entered on the record, if they had been apprized of the nature of the action, at the time of the application; and, although the 100th section of the statute enacts, that sums forfeited under the act may be sued for by the assignees, yet the 67th section, by which one assignee may be substituted for another, must be confined to actions brought for the recovery of debts, and cannot be extended to an action for a penalty.

Lord Chief Justice *TINDAL*.—The determination of this question must depend on the construction to be put upon the 67th and the 100th sections of the statute 6 *Geo.* 4, c. 16. Nothing can be more large or comprehensive than

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the language of the 67th, as it embraces and conveys every right that can be possibly afforded to the new assignee; for, after he is chosen, the action is to be prosecuted in his name, in the same manner as if he had originally commenced such action. But it has been said, that that section does not apply or extend to an action brought for the recovery of a penalty, as it forms no part of the bankrupt's property or estate which the new assignee has a right to claim. But this objection appears to me to be answered by the 100th section, which enacts, "that all sums of money forfeited under the act, may be sued for by the assignees in any of his Majesty's Courts of record, and the money so recovered (the charges of suit being deducted) shall be divided among the creditors." If, therefore, the money to be recovered for a penalty or forfeiture, is to be divided among the creditors, and distributed in the same manner as the effects of the bankrupt's estate, the succeeding or newly appointed assignee must be considered as standing in the same position as the original assignee; and, as he must be the party to make the distribution, and the penalty is subject to the same mode of distribution as the estate and effects of the bankrupt, *eo nomine*, in the deed of assignment, the new assignee is entitled to sue for a penalty, and to recover it, for the purpose of dividing it among the creditors; and, it is quite clear that the right of prosecuting the action which had been commenced by the former assignee, passed to the plaintiff under the 67th section of the statute.

Mr. Justice PARK.—The motion to set aside the verdict for the plaintiff, is founded on two grounds.—*First*, that it was incumbent on him to have shewn that the provisional assignment from the defendant to the former assignee had been duly enrolled pursuant to the 96th section of the statute:—but the plaintiff was not bound to give that assignment in evidence, as he proved his case and title to sue, *abunde*. The deed of assignment to the former assignee

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contained a recital of the assignment of the bankrupt's estate to the provisional assignee, who is a mere conduit pipe to the second or ultimate assignee. With respect to the objection, that the present plaintiff cannot be entitled to sue or recover for a penalty, if there were any ground for it, the proper course would have been to have moved the Court to rescind the order for the suggestion. It was in their discretion to allow it to be entered on the record, or not; and when it was stated, that the original assignee was dead, the rule for entering the suggestion of his death on the record was directed to be made absolute in the first instance; and the action does not abate by such death, as the 67th section expressly enacts, that it shall be prosecuted in the name of the new assignee, in the same manner as if it had been commenced by him.

Mr. Justice GASELEE.—I am of opinion that the plaintiff is entitled to retain the verdict on the merits, and that the Jury have done right in finding for him. The declaration contained the common money counts, and the objection as to the plaintiff's not being entitled to sue for a penalty was not taken at the trial.

Mr. Justice BOSANQUET.—The objection on the 96th section of the statute can only apply where it becomes necessary for the plaintiff to give in evidence the provisional assignment and the other proceedings under the commission. With respect to the penalty, it cannot be assimilated to the case of a common informer. The 45th section imposes a penalty of 200*l.* on the first assignee, if he does not deliver up all the bankrupt's effects and estate which he has become possessed of, to the new assignee or assignees. The 67th section enacts, that a suit is not to abate by the death or removal of an assignee, but that it may be prosecuted in the name of the new assignee, as if it had been

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originally commenced by him; and, by the 100th section, the sum recovered for a penalty or forfeiture under the act is to be divided among the creditors. It therefore appears to me, that the suggestion of the death of the original assignee was properly entered on the record, and that the right of action survived to the plaintiff as the newly appointed assignee.

Rule refused.

Friday,
 May 27th.

The defendant, the master of a vessel, agreed in writing to take out to the *Cape of Good Hope* a boat belonging to the plaintiff, not exceeding thirty feet in length and ten in width. The plaintiff tendered a boat within these dimensions, but it was a decked boat. The defendant refused to take it on board unless the deck were removed; and he offered to take it off and replace it on the arrival of the vessel at the *Cape*. This the plaintiff declined. The defendant proved that it was the custom to remove the decks of such boats, as they tended to impede the navigation of the vessel:—*Held*, that such evidence was properly received, and that the plaintiff could not recover against the defendant in an action for a breach of the agreement for not taking out the boat.

HAYNES v. HALLIDAY.

THIS was an action of *assumpsit*, by which the plaintiff sought to recover damages for the breach of the following agreement, entered into and signed by the defendant:—

“August 25th, 1829.

“In consideration of the sum of 50*l.* now paid, or previous to embarkation, I, *James Halliday*, master of the ship *Protector*, bound to the *Cape of Good Hope* and *Cockburn's Sound*, agree to take out to the above places a boat belonging to *John Haynes*, not exceeding thirty feet in length, and ten feet and a half in width, dangers of the sea excepted; I agree to find the said *John Haynes* a steerage passage, and provisions likewise, on payment by him to me of the further sum of 25*l.* previous to his embarkation.

“*James Halliday.*”

At the trial, before Mr. Justice *Alderson*, at *Westminster*, at the Sittings after the last term, it appeared that the plaintiff, being about to proceed to the *Swan River*, and

take a boat with him for the purpose of landing passengers there, the defendant agreed to take him and the boat on the terms above mentioned; that the plaintiff paid the defendant 75*l.*, but that when the boat was brought alongside the vessel, although it was within the dimensions specified in the agreement, it had a deck, being one of the sailing craft known in the river *Thames* by the name of hatch boats; upon which the defendant refused to take it on board, unless the plaintiff would cause the deck to be taken off; to which the plaintiff replied, that it was an old boat, and that if he did so, she might fall to pieces. The defendant's carpenter then offered to take off the deck, and to replace it on the vessel's arriving at *Cockburn's Sound*. This, however, the plaintiff declined, and afterwards commenced the present action against the defendant for refusing to take out the boat pursuant to the agreement.

For the defendant, several witnesses were called, who stated, that it was the custom to remove the decks from such boats, when they were taken on board ship, as, if they were allowed to remain on, they would greatly impede the navigation of the vessel.

The learned Judge told the Jury, that the word 'boat' must be taken to mean and comprehend any vessel that might reasonably be brought within that term; that it could not apply to a steam boat, or a *Gravesend* boat; and that, although it was frequently employed to designate vessels of heavy tonnage, yet, that such a vessel could not be contemplated by the terms of the defendant's agreement, as the boat was to be taken on board his vessel; and it was left to the Jury to say—*First*, whether the plaintiff's was a boat, within the meaning of the agreement;—*Secondly*, whether it was the usual and customary mode to take off the decks of such boats when they were taken on board ship;—and *lastly*, whether the plaintiff ought not to have offered to take off the deck of his boat, or acceded to the

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proposal made by the ship's carpenter. The Jury found a verdict for the defendant, leave being reserved to the plaintiff to move to set it aside, and that a verdict might be entered for him instead thereof, in case the Court should be of opinion that the defendant was bound to take out the boat tendered to him by the plaintiff, as being a boat within the terms or meaning of the agreement.

Mr. Serjeant *Taddy* yesterday applied for a rule nisi accordingly. It is quite clear that a hatch boat is a *boat* in the strictest and most limited sense of that word, and it is equally clear that such a boat may be comprehended, and falls within the terms and language of the agreement, which extends to a boat of any description of the specified dimensions, which might be capable of being taken on board the defendant's vessel. The defendant himself made no objection to the description of the boat, and, therefore, *parol* evidence ought not to have been received as to the custom of taking off the decks of such boats, when taken on board ship. But even if the defendant might have been entitled to have the deck taken off, he was bound to take the boat on board; but he positively refused to do so. The carpenter might have removed the deck with ease, after the boat was on board, and the plaintiff might then have permitted him to do it. A carriage might be equally inconvenient on board a vessel, and impede her navigation as much as a decked boat; but the master of such vessel could not refuse to take the carriage on board, unless the wheels were previously taken off. He might perhaps order it to be done, when it was found that it interfered with or obstructed the navigation of the ship. By the agreement, the defendant was bound to take the boat on board at all events; and if he intended to have excluded *deck* boats, he might have done so by the introduction of that word. If he had agreed to take a package of certain dimensions on board, he was bound to do so, although the articles might have been so

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packed, as to cause an inconvenience to the passengers or the crew; and the question which ought to have been left to the Jury was, whether the defendant did not refuse to take the plaintiff's boat on board, and not whether the plaintiff ought not to have offered to take off the deck. At all events, the plaintiff is entitled to a new trial, as he was only prepared with evidence to shew that his boat was tendered to the defendant, and that he refused to take it on board; and the evidence as to the custom of taking off the decks of such boats was altogether a matter of surprise upon him, and ought not to have been admitted.

As Mr. Justice *Alderson* was not in Court, the Lord Chief Justice stated, that he would confer with him before the Court granted the rule.

His Lordship, after reading the agreement, now said—
“ We think there is no ground for granting a rule to set aside the verdict found for the defendant, pursuant to the leave reserved; or for a new trial. When the plaintiff's boat was brought alongside the defendant's vessel, to be received and placed on board, it was in part covered with a deck; and, according to the evidence adduced for the defendant, it would, if taken on board with the deck on, have impeded the navigation of his ship. Although the terms of the contract or agreement may include a boat covered with a deck as well as an open boat, yet it must be implied that the parties tacitly agreed that it should be such a boat as not to impede or obstruct the navigation of the vessel. The defendant, at the time, pointed out to the plaintiff his objection to receive it on board, and the ship's carpenter offered to take off the deck and replace it on the arrival of the vessel at *Cockburn's Sound*; so that the plaintiff, by declining to accept that offer, prevented the defendant from performing his contract. With respect to the alleged surprise on the plaintiff, by the admission of evidence

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to prove the custom of removing the decks of such boats when taken on board ship, the plaintiff must have been aware of the nature of the defence, as he knew the specific ground on which the defendant refused to take the boat on board his vessel.

Rule refused.

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JOHN VALLANCE v. EDMUND SAVAGE.

In an action on the case for an alleged injury to the plaintiff's reversionary interest in a house, he averred in his declaration that the premises were in the occupation of one S. P. as tenant thereof to the plaintiff. It was proved that the house had been let to S. P. by a *cestui que trust*, to whom she had paid rent, the plaintiff being his trustee:—
Held, to be no variance, as the legal estate was in the plaintiff, and the *cestui que trust* was to be considered as his agent or bailiff.

The plaintiff having proved a right of way over a piece of ground from 1776 to

1830, and it appearing that the soil had, in 1828, been conveyed to commissioners appointed under a local act of Parliament:—*Held*, that the plaintiff was entitled to a compensation for the obstruction of the way by one of the commissioners, although such commissioners were empowered to erect a market upon the *locus in quo* more than fifty years before the obstruction took place.

The plaintiff, in his declaration, alleged that there was a public way to pass and re-pass on foot and with carts. The Jury negatived a footway. *Quære*, whether the allegation is divisible?

THIS was an action on the case, and brought against the defendant, one of the commissioners for paving and improving the town of *Brighton*, for an alleged injury to the plaintiff's reversionary interest in a public house called the *Three Tuns*, adjoining the market, which had lately been erected there.

The first count of the declaration stated, that before and at the time of the committing of the grievances in that and the several counts thereafter mentioned, the defendant then and still was one of the commissioners appointed and acting under and by virtue of, and for putting into execution an act of Parliament for the better regulating, paving, improving, and managing the town of *Brighthelmstone*, in the county of *Sussex*, and the poor thereof; that also, before and at the time of the committing of the several grievances thereafter next mentioned, a certain messuage or dwelling-house called the *Three Tuns*, with the appurtenances, situate and being at *Brighthelmstone* aforesaid, was in the occupation of one *Sarah Poll*, as tenant thereof to the plaintiff, to wit, at *Brighton* aforesaid; that also, before the committing of the grievances, &c., there was, and still

of right ought to be, a public and common highway for all the liege subjects of our lord the King, to pass and repass at their free will and pleasure *on foot and with carts*, unto and to the said messuage, &c., every year, and at all times of the year, and thereby to pass unto a certain door of the yard of the said messuage, &c., there to deliver goods and chattels, and to frequent the said messuage, &c., for the more beneficial and profitable use and occupation thereof; and that the said messuage, with the appurtenances, until the times of committing the said grievances, &c., was, and of right ought to have been, and still of right ought to be of free and easy access to all customers of the said *Sarah Pell*, and all the King's liege subjects passing in and along the said highway, who might be desirous of frequenting the said messuage, &c., for the purpose of employing the tenant or tenants for the time being of the said messuage, occupiers of the same, in the way of her, his, or their business, from time to time carried on therein; yet, that the defendant as such commissioner, and so acting as aforesaid, well knowing the premises, but contriving, &c., to injure, prejudice, and aggrieve the plaintiff *in his said reversionary estate and interest* of and in the said messuage, &c., whilst the same was so in the possession and occupation of the said *Sarah Pell*, *as tenant thereof to the plaintiff*; and whilst he, the plaintiff, was so interested therein as aforesaid, to wit, on &c., and on divers other days and times, to wit, at *Brighton* aforesaid, wrongfully and unjustly, and without the leave or licence, and against the will of the plaintiff, made and erected, and caused to be made and erected, in and upon the said highway, divers obstructions, erections, and buildings, and wrongfully and injuriously kept and continued the said obstructions, erections, and buildings, in and upon the said highway respectively, for a long space of time, to wit, from thence until and at the time of the commencement of this suit. By means of which said several premises, the plain-

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tiff had been and was greatly injured, prejudiced, and aggrieved in his said reversionary estate and interest of and in the said messuage, &c., so in the possession and occupation of the said *Sarah Pell* as tenant thereof to the plaintiff, to wit, at *Brighthelmstone* aforesaid.

At the trial, before Mr. Justice *Gaselee*, at the last Assizes at *Lewes*, it appeared, that the premises, consisting of a public-house, known by the name of the *Three Tuns*, were copyhold, to which the plaintiff had been duly admitted on the death of his father, in 1792; that he had the legal title to the reversion; and that he was trustee for his brother *James Vallance*, who had demised the house in his own name to *Sarah Pell*, under a written agreement, and by which she was to occupy under him as a tenant from year to year, and that she had taken possession and paid the rent to *James Vallance* accordingly. It appeared also, that the obstruction of which the plaintiff complained was the erection of a town hall by the order of the defendant and others acting as commissioners for improving the town of *Brighton*, close to the door of the yard of the plaintiff's house, and upon the road or way that led to the back of the premises. The plaintiff proved that the way on which the hall was built had been used as a cart or carriage way from the year 1776, and as a footway long antecedently to that period. That when the old market was made, in 1774, an open space was left at the rear of the house, and that persons were constantly in the habit of coming to the back door with carts, and delivering flour, beer, coals, and other articles, till the erection of the building in question.

For the defendant, three acts of Parliament were put in, the first passed in the 13 *Geo. 3*, c. xxxiv. (1778), an act for paving, lighting, and cleansing the streets, &c., within the town of *Brighton*, and for holding and regulating a market within the said town, and for various other purposes. The second was passed in the 50 *Geo. 3*, c. xxxviii. (1810),

by which the 13 *Geo. 3* was repealed; and the third act was passed in the 6 *Geo. 4*, c. lxxix. (1825), which repealed the 50 *Geo. 3*; and the defendant and the other commissioners acted under the 6 *Geo. 4*, at the time of the erection of the town hall.

For the defendant, it was objected—*First*, that the plaintiff could not be entitled to recover, on the ground of a variance between the declaration and evidence, he having alleged that *Sarah Pell* was in occupation of the premises as tenant to him, whereas she entered and occupied under *James Vallance*, by virtue of a written demise from him, and to whom she had paid her rent accordingly. *Secondly*, that, as the commissioners were appointed for the purposes of erecting a market and improving the town of *Brighton*, although the space on which the town hall was built had been used as a cart or carriage way from the year 1776, if it had been the property of a private individual, a dedication to the public might have been presumed; still, that such a presumption could not be raised against the commissioners, whose duties were to erect a market and further improve the town of *Brighton*; and the erection of the building in question was absolutely necessary for such improvement. The Jury found that there was no public carriage way over the *locus in quo* before the year, 1774, but a private footway only; but that since that year it had been used as a way for carts and other carriages; upon which it was objected for the defendant, that the plaintiff could not maintain this action, as he had alleged in his declaration that it was a public highway for all persons to pass and repass *on foot and with carts*, whereas the Jury negatived that fact, and the allegation was not divisible, neither could it be severed, so as to support the finding of the Jury. A verdict, however, was taken for the plaintiff, damages one shilling, leave being reserved to the defendant to move to set it aside and enter a nonsuit, in case the Court should be of opinion, that,

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under all the circumstances, the plaintiff was not entitled to recover.

Mr. Serjeant *Andrews*, in the last Term, obtained a rule nisi accordingly, and recapitulated and relied on the several objections taken at the trial.

Mr. Serjeant *Taddy* and Mr. Serjeant *Wilde* were now about to shew cause, when—

[Mr. Justice *Gaselee*, after reading his report, said—That, with respect to the objection as to the dedication of the way to the use of the public, it was rather a question for the Court than the Jury, as it appeared, that, from 1776 to 1810, it was continually used as a public carriage-way; that, in the latter year, the *locus in quo* was vested in the directors and guardians of the poor of *Brighton*, who agreed to convey it to the commissioners appointed under the 50 Geo. 3, but that the conveyance was not made to the defendant and the other commissioners acting under the 6 Geo. 4, until the year 1828].

The learned Serjeants, however, submitted—*First*, that the allegation in the declaration, that *Sarah Pell* was in occupation of the premises as tenant to the plaintiff, was proved in substance, or, at all events, was sufficiently proved for the purposes of this action, by which the plaintiff sought to recover a compensation for an injury done to his reversionary interest; and it was enough for him to shew that he had the reversion. Although *James Vallance*, the *cestui que trust*, had a beneficial interest, yet the legal estate is in the plaintiff. The question is not to whom the tenant or occupier paid the rent, but under whom she held the premises, and in law she must be considered as the tenant of the plaintiff, the legal estate being in him; and as she was let into possession under a contract made with the *cestui que trust*, such contract must be taken to have been made with the concur-

rence and assent of the plaintiff, from whom alone the tenant could derive a legal right of possession. The case of *Taylor v. Waters* (a) established the principle, that where a trustee, in whom the legal estate is vested, leaves the management of it to a *cestui que trust*, his acts in the course of the management must be taken to be authorized by the trustee, and are binding upon him; and this, although no person had any notice or knowledge of the claim of the trustee. The same principle applies to the case of a mortgagor and mortgagee, who are not so intimately connected as a trustee and a *cestui que trust*. In *Pope v. Biggs* (b), Mr. Justice *J. Park*, after adopting the doctrine laid down by Lord Mansfield in *Moss v. Gallimore* (c), viz. that the mortgagor receives the rent by a tacit agreement with the mortgagee, said—"The mortgagor may be considered as acting in the nature of a bailiff or agent for the mortgagee." So, here, the *cestui que trust* may be considered as having acted as the agent of the plaintiff as trustee, and that Mrs. *Pell* was let into the possession of the premises with the plaintiff's assent. Secondly, as the Jury found that the spot on which the building was erected was constantly used as a cart or carriage way from 1776 to the time of the obstruction, the plaintiff is entitled to retain his verdict. An uninterrupted and general *user* of a road or way for twenty years as a carriage way, is sufficient to raise a presumption that it had been dedicated to the public; and here, although the commissioners were authorized to erect the market, they could not deprive the public of their rights; and though they might have made avenues or approaches to the market, they were not justified in stopping up a highway which had been used without interruption for more than fifty years. But it now appears, that the commissioners acting under the 6 *Geo. 4*, of whom the defendant was one, had no right to the soil until 1828,

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(a) 2 Marsh. 551; S. C. 7 4 Man. & Ryl. 193.
Taunt. 374.

(c) Doug. 279.

(b) 9 Barn. & Cress. 258; S. C.

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when it was conveyed to them by the directors and guardians of the poor. The obstruction of the way by the defendant was in violation of his duty as a commissioner; and as no interest in the soil accrued to him until 1828, he could not infringe on an antecedent and existing public right which had so long been exercised, and he ought to have preserved the communication to the back of the plaintiff's house; instead of which he caused it to be obstructed altogether. *Lastly*, as to whether the allegation in the declaration "on foot *and* with carts," was divisible or not, it was not incumbent on the plaintiff to prove that the way had been used as a footway and also as a carriage way. In *Ricketts v. Salwey (a)*, in an action for a disturbance of the plaintiff's right of common, the declaration stated, that he was possessed of a messuage and land, with the appurtenances, and, by reason thereof, ought to have common of pasture, &c., it was held, that this allegation was divisible, and that proof that the plaintiff was possessed of land only, and entitled to the right of common in respect of it, was sufficient to entitle him to damages *pro tanto*; and Lord Chief Justice Abbott said—"The general rule of pleading, in cases of *tort*, is, that it is sufficient if part only of the allegation stated in the declaration be proved, provided that what is proved affords a ground for maintaining the action, supposing it to have been correctly stated as proved." So, here, the footway and cartway were two distinct and separate rights; and it was sufficient for the plaintiff to prove an obstruction to the cart or carriage way, to entitle him to damages for such obstruction; and, in *Jones v. Clayton (b)*, where, in an action against the Sheriff for a false return of *nulla bona*, it was alleged in the declaration that two persons had goods within his bailiwick, it was held, that the allegation was severable, the legal effect of it being, that both or either of them had goods within the bailiwick.

(a) 2 Barn. & Ald. 360.

(b) 4 Mau. & Selw. 349.

Mr. Serjeant *Jones* and Mr. Serjeant *Andrews* in support of the rule.—The plaintiff having alleged that *Sarah Pell* was in occupation of the premises as tenant to him, he was bound to prove it; but as it appeared that she held under an agreement in writing from *James Vallance*, to which the plaintiff was no party, it was a fatal variance between the allegation and proof. The plaintiff might have stated the nature of his interest, *viz.* that he was trustee for his brother *James*, who demised the premises to Mrs. *Pell* in his character of *cestui que trust*. The plaintiff could not have distrained, as there was no privity of contract between him and Mrs. *Pell* to create the relation of landlord and tenant. In *Martin v. Goble (a)*, in an action for a nuisance to a dwelling-house, the declaration stated, that, at the time of committing the grievance, the plaintiff was seised in fee of the house, and that it was then in the possession and occupation of a certain tenant or certain tenants thereof under the plaintiff; and it appeared that the plaintiff was seised in fee for the use of the inhabitants of a particular parish, and that the house was occupied by the parish paupers, and a person appointed by the parish officers to take charge of them—it was held, that neither the poor, nor the master of the workhouse could be considered as tenants to the plaintiff, and that there was a fatal variance between the declaration and the evidence in that respect. So, here, the house was not in the occupation of *Sarah Pell* as tenant thereof to the plaintiff, as she held under *James Vallance*, to whom she paid the rent. In *Cotterill v. Hobby (b)*, where, in an action on the case for an injury to the plaintiff's reversionary interest in land, it appeared in evidence, that the land was let by the plaintiff to the occupier under a written agreement—it was held, that the plaintiff was bound to produce it; and Mr. Justice *Bayley* said—"The terms of the holding

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(a) 1 Camp. 320. (b) 4 Barn. & Cress. 465; S. C. 6 Dowl. & Ry. 551.

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could only be proved by that instrument;" and here, if the plaintiff had produced the agreement, it would have been at variance with the allegation that *Sarah Pell* occupied as tenant to him; and although it might not have been necessary for him to have alleged who the tenant was, yet, having done so, the averment should have been according to the fact, *viz.* that she held under an agreement from *James Vallance*, for whom the plaintiff was trustee.

Secondly, as the Jury found that there was no carriage way over the *locus in quo* previously to the year 1776, no such way can now be presumed, nor can it exist but by grant or a dedication to the public; and although it appears that the right of the commissioners only accrued to them in 1828, yet the property was vested in those commissioners who were appointed under the 13 *Geo. 3*, and an absolute conveyance of the soil was not necessary, as they were authorized to remove all nuisances and annoyances, and to prevent the same for the future, and to make avenues and approaches to the market. The plaintiff has merely claimed a right of way to the back door of the house; and as the commissioners were appointed for certain specific purposes, and the object of all the acts was the further improvement of the town of *Brighton*, they were authorized in erecting the building in question. *Lastly*, although it has been said that the allegation of the way claimed by the plaintiff on foot *and* with carts, is divisible, on the authority of *Ricketts v. Salwey*, yet it is a distinct and substantive allegation, applies to wholly different claims, and is descriptive of the right itself. A carriage-way, *ex necessitate*, includes a footway, and the existence of both has been expressly negatived by the finding of the Jury.

Lord Chief Justice TINDAL.—This is an action on the case, and brought in the name of *John Vallance*, as plain-

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tiff, against the defendant, for an alleged injury sustained by the plaintiff to his reversionary interest in a certain messuage and premises at *Brighton*. The injury is described in the declaration to be the wrongful erection and continuance of an obstruction upon a public highway leading to the door of the yard of the plaintiff's messuage; in stating his title to which, he alleged, that the messuage was in the occupation of one *Sarah Pell*, as tenant thereof to him the plaintiff. It has been objected in the *first* place, that *Sarah Pell* was not tenant to the plaintiff, but to one *James Vallance*, and, consequently, that the plaintiff had not the reversionary interest as alleged in the declaration. The evidence was, that the messuage and premises were copyhold, and that the plaintiff, *John Vallance*, had been duly admitted a tenant, and that he was trustee for his brother *James*, who was consequently his *cestui que trust*; that *James Vallance*, by a written agreement, had let the premises to *Sarah Pell*, as a yearly tenant, and that she had paid him rent according to the terms of the agreement. Although it has been said that she was improperly described as being tenant to the plaintiff, and consequently, that there was a variance between the averment in the declaration and proof in this respect, yet it is the simple case of a trustee and a *cestui que trust*. The legal estate is in the plaintiff as trustee; and if a real action were to be commenced, it must be prosecuted in his name; for the *cestui que trust* has no interest in law, and the only enjoyment he can derive, is from the permission of his trustee. So, if he had entered, his possession would be considered, and might be declared on, as the possession of the trustee. So, again, any act done, or disposition made by the *cestui que trust*, and adopted by the trustee, must be considered as the act and disposition of the trustee; because, the *cestui que trust* can only possess the property in the right of, or by the sanction or permission of the trustee. Here, therefore, as the plaintiff, as trustee, has

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brought the action in his own name, and alleged that *Sarah Pell* held as tenant to him, it is an adoption of the letting of the premises to her by *James Vallance*, the *cestui que trust*; and, consequently, there has been no failure in the proof of the allegation in the declaration, that *Sarah Pell* held as tenant to the plaintiff. Even in the case of a mortgagor and mortgagee, whose interests are adverse, and not concurrent, as in this case, the acts of the mortgagor, if assented to or confirmed by the mortgagee, are considered as the acts of the latter. *A fortiori*, therefore, the act of the *cestui que trust*, who derives his interest under the trustee, must, if adopted and not repudiated by the latter, be considered as his act.

With respect to the *second* objection, the Jury having found that there was a public right of way for carts and other carriages over the *locus in quo*, from 1776 to the time of the obstruction, and it now appears that the commissioners acquired no legal right to the soil until 1828, the objection cannot avail. If, indeed, the spot over which the plaintiff claimed a right of way had been vested in the commissioners either by the 13th or the 50th of *Geo. 3*, for the purposes expressed by those acts, it would have been in violation of their trusts to appropriate it to general purposes, and inconsistent with the acts they were called upon to perform, namely, the erection of the market and the improvement of the town. But it appears, that in 1810 the soil of the *locus in quo* was vested in the directors and guardians of the poor, who conveyed it to the commissioners in 1828; and the 50th *Geo. 3*, contained a recital that they were then about to purchase it. In the interval, therefore, between 1776 and 1810, no objection can be raised to the presumption of a dedication to the public; and, until the conveyance was made to the commissioners, they could not detract from or vary the rights of the public acquired antecedently to that period, namely, from 1776 to 1828; and the obstructing the way was an inju-

ry to the plaintiff's reversionary interest in the house, and for which he had a good cause of action. It is therefore unnecessary to consider the last objection, namely, the divisibility of the allegation in the declaration of a foot and cart-way.

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Mr. Justice PARK.—I am entirely of the same opinion. The legal title to the premises in question is in the plaintiff, and he therefore has a right to maintain this action. Although the *cestui que trust* might have demised the premises, it will not alter the case, for he must, to a certain degree, be considered as the agent or bailiff of the trustee; and if he ratifies or confirms the acts of the *cestui que trust*, they must be considered as the acts of the trustee himself. With respect to the second objection, it is quite clear, that there was a public user of the way in question for more than fifty years previously to the obstruction by the defendant; and the property of the soil of the *locus in quo* was not vested in the commissioners until 1828. With respect to the divisibility of the allegation in the declaration, as to the foot and carriage-way, it is unnecessary to consider it, and the Jury having found a right of way for carriages, the verdict may be entered for the plaintiff *pro tanto*.

Mr. Justice GASELEE.—I never entertained any doubt on the first question. The occupier, *Sarah Pell*, was tenant to the plaintiff under an agreement made by the *cestui que trust*, who must be considered as the agent of the trustee for that purpose. The rent, which was payable to the plaintiff as trustee, was, by his implied permission, received by the *cestui que trust*. With respect to the second objection, when it was ascertained that the commissioners only derived their authority to exercise an absolute and exclusive right over the *locus in quo* by the conveyance to them in 1828, and the plaintiff proved that it had been used as a carriage way from 1776 to the time of the obstruction by the defendant, the plaintiff was entitled

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to recover. Although the third objection raises a question of considerable difficulty, it is not necessary to decide it, as the plaintiff is entitled to a verdict for the obstruction by the defendant of the carriage way to the back part of his premises.

Mr. Justice BOSANQUET.—I also abstain from giving any opinion on the objection raised to the divisibility of the allegation in the declaration. With respect to the first and main question, it appears to me, that the whole legal right is in the plaintiff as trustee. The *cestui que trust* must, in law, be considered as his agent, and who, as such, suffered Mrs. Pell, the tenant, to take possession. Although she engaged to pay the rent to the *cestui que trust*, yet he had no legal interest, neither did she hold or occupy the premises adversely to the plaintiff, he has the reversionary interest, determinable upon, and subject to, her right of possession, to which he must be taken to have assented. With regard to the other objection, as the plaintiff proved the constant *user* of a carriage way over the *locus in quo*, from the year 1776 to the time of the obstruction, it was *prima facie* evidence of a dedication to the public; and, as it appeared that no right to the soil was vested in the commissioners until 1828, and the parties who conveyed to them only acquired their right in 1810; it is impossible to say that a dedication to the public might not be presumed from 1776 to that period; and the obstruction is properly described to be injurious and prejudicial to the plaintiff's reversionary interest.

Rule discharged.

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STANIFORTH v. FOX.

THIS was an action of *assumpsit* for the breach of an agreement. The first count of the declaration stated, that, on the 11th *September*, 1830, at *Leeds*, by a certain agreement then and there made between the plaintiff and the defendant; the defendant agreed to let to the plaintiff the whole of his premises situate in *Spring Street, Sheffield*, to wit, three cottage houses, one stable and victualing house, and all the buildings thereto connected, for the term of ten years, and also to build a brewhouse, and make a large cellar under the yard at his own expense, and to pay the ground-rent for the whole of the premises:— and the plaintiff did thereby agree to take the said premises of and from the defendant, at the yearly rent of 35*l.*, payable half yearly. The plaintiff then, after averring mutual promises, alleged, that, although he, from the time of making the agreement hitherto, had been ready and willing to perform all things therein contained, on his part and behalf to be performed and fulfilled:—and although the plaintiff afterwards requested the defendant to permit and suffer him, the plaintiff, to enter upon and become tenant to the defendant of the said premises, for the period, and upon the terms aforesaid, and to deliver up possession of the same to him, the plaintiff, within a reasonable time then next following;—yet, that the defendant, not regarding the said agreement or promises by him so made, but contriving, &c., did not nor would, when so requested as aforesaid, or at any time before or afterwards, let the said premises to the plaintiff for the period and upon the terms aforesaid, nor did nor would the defendant build a brewhouse or make a cellar under the said premises as agreed upon by and between the plaintiff and the defendant, nor would the defendant deliver up the possession of the pre-

By an instrument in writing, dated the 11th of *September*, 1830, the defendant agreed that day to let to the plaintiff the whole of his premises, situate &c., for ten years; he further agreed to build a brewhouse and make a cellar at his own expense, at the yearly rent of 35*l.*, to be paid half yearly. He further agreed to pay the ground rent, which was 4*l.* yearly; and acknowledged that he had that day received from the plaintiff, 4*l.* in earnest:—*Held*. to be an actual and present demise, and not any agreement for a lease; and, therefore, that it required a lease stamp.

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mises to the plaintiff; but, on the contrary thereof, wholly refused, and still refuses so to do.

At the trial, before Mr. Justice *Littledale*, at the last Assizes at *York*, the plaintiff gave in evidence the following agreement in writing, signed by the defendant.

"September 11th, 1830.

"An agreement between *George Fox* and *John Staniforth*. *George Fox* does this day agree to let Mr. *John Staniforth* the whole of his premises situate in *Spring Street, Sheffield*, for the term of ten years, namely, three cottage houses, one stable and victualling house, and all other buildings thereunto connected; also, he does further agree to build a brewhouse and make a large cellar under the yard at his own expense, at the yearly rent of 35*l.*, to be paid half yearly. And that the said *George Fox* does further agree to pay the ground-rent, which is 4*l.* 0*s.* 3*d.* yearly, for the whole of the premises; and that the said *George Fox* has this day received from the said *John Staniforth*, the sum of 4*l.* in earnest."

The instrument being stamped with an agreement stamp only, it was objected for the defendant that it was insufficient, as it ought to have been impressed with a lease stamp. The learned Judge thought the objection to be well founded, as the words *agree to let*, must be considered the same as *let*; and therefore, that the instrument amounted to a lease, as it contained words of present demise. He therefore directed a nonsuit to be entered, reserving leave to the plaintiff to move to set it aside, and that a verdict might be entered for him, in case the Court should be of opinion that the instrument was an agreement, and not a lease.

Mr. Serjeant *Jones*, in the last term, obtained a rule *nisi* accordingly.—The instrument in question was only an

executory agreement for a lease, and not a lease, and was therefore properly stamped with an agreement stamp. The action was brought against the defendant for not letting the plaintiff into the possession of the premises, according to the terms of the agreement. In *Bacon's Abridgment* (a), the rule is thus laid down, *viz.* "that whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession, and the other come into it for such a determinate time, such words, whether they run in the form of a licence, covenant, or agreement, are of themselves sufficient, and will, in construction of law, amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose: and, on the contrary, if the most proper and authentic form of words whereby to describe and pass a present lease for years are made use of, yet, if upon the whole deed there appears no such intent, but that they are only preparatory and relative to a future lease to be made, the law will rather do violence to the words, than break through the intent of the parties." Here, however, the question will not depend upon such intent; for, although the defendant as lessor agreed to let the premises, yet the immediate possession was not parted with by force of the agreement. Besides, he agreed to make additions to the premises at his own expense, and which it would take some time to complete; and, as no period was fixed upon when the plaintiff was to take possession, or the rent was to commence, the term must be taken to begin from the time when the brewhouse and cellar were built and completed, for, until that was done, the plaintiff could not derive the beneficial interest the parties contemplated at the time the agreement was entered into; and it was necessary for the defendant to have the sole and exclusive possession and occupation of the premises until the buildings were erect-

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(a) Tit. "*Leases*," (K).

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ed and completed. In *Dunk v. Hunter* (a), where, under a memorandum of agreement, the landlord agreed to let on lease, and the tenant was to enter on the premises at any time on or before a particular day, on paying on entry 50*l.*, the Court held that it only amounted to an agreement for a future lease. And Mr. Justice *Holroyd* said—“The stipulation as to the payment of 50*l.* upon entry is quite inconsistent with this being an actual demise; for, if it were an actual demise, the tenant would have had a right to enter immediately, without paying that sum;” and here, as it appears on the face of the agreement, that the plaintiff paid the defendant 4*l.* in earnest, which he acknowledged to have received, it shews that something was to be done by the landlord before the tenant was to take possession; the sum was paid to bind the bargain, and the plaintiff was not to enter or pay rent until the buildings were completed by the defendant according to the stipulations contained in the agreement.

Mr. Serjeant *Cross* now shewed cause.—As the instrument in question amounted to a positive agreement by the defendant to let to the plaintiff the whole of his, the defendant's premises, without any qualification, it is equivalent to, and in effect, an actual and present demise. No intention is expressed as to a future lease, as in *Dunk v. Hunter*, where the tenant was to enter on a future day: and as Lord Chief Justice *Abbott* said—“the words ‘agrees to let on lease,’ obviously meant to execute a lease.” Here, however, there was a positive and unqualified demise, without any reference to a future lease. Although the defendant, as landlord, agreed to build a brewhouse and make a cellar at his own expense, yet the plaintiff had an existing interest in the premises demised. In *Doe d. Jackson v. Ashburner*, Mr. Justice *Ashhurst* said (b)—“Where the

(a) 5 Barn. & Ald. 322.

(b) 5 Term Rep. 168.

words are *de presenti*, 'I demise,' &c., or an agreement that 'the party shall hold and enjoy,' and the party is immediately put into possession, the landlord shall not afterwards turn him out of possession, and say that it was not a present demise; for, the permitting the party to enter, is strong evidence to shew that the landlord intended to give a present interest." In *Barry v. Nugent* (a), where the words of the instrument were, "Be it remembered, that *I. B.* (the defendant) *hath let, and by these presents doth demise,*" &c., it was held to operate as a present demise, although the instrument contained a covenant for a more formal lease. And in *Doe d. Walker v. Groves* (b), an instrument whereby the landlord agreed to let, and also, upon demand, to execute to the tenant a lease of a farm; and the tenant agreed to take, and upon demand to execute a counterpart of a lease of the said farm, which lease was to contain the usual covenants, and the agreement was to be binding until the lease was executed, and the tenant entered under the agreement, it was held to be a present demise; and, therefore, to require a lease stamp. These cases have established the principle, that, if an instrument, professing to be an agreement for a lease, is in itself a transfer of possession, it is a lease, though it contain a stipulation for executing a formal lease at a future period; and here, the words "does this day agree to let," at the commencement of the instrument, "and that the defendant has this day received from the plaintiff the sum of 4*l.* in earnest," at the conclusion, are sufficient to shew that the parties meant that there should be a present and immediate demise: the instrument should therefore have been stamped with a lease stamp accordingly.

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Mr. Serjeant *Jones* in support of his rule.—It is quite

(a) 5 Term Rep. 165, n.

(b) 15 East, 244.

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clear, that this instrument is an agreement for a lease, and not a present demise. Although, in *Pisero v. Judson* (a), where *A.* agreed to execute to *B.* a lease of premises for a term of years at a certain annual rent, and subject to covenants by *B.*, for payment of the rent and taxes, and to keep the premises in repair; and *B.* agreed to accept the lease, and in the mean time, and until the lease should be executed, to pay the rent, and to hold the premises subject to the covenants above mentioned, it was held, that this was an actual demise, and not an agreement for a future lease; yet, Lord Chief Justice *Tindal* said—"The law has long since been settled, that when the words of an instrument of this description are doubtful or ambiguous upon the face of it, the Court must endeavour to ascertain the intention of the parties at the time it was entered into; and this must be collected from the terms of the whole of the instrument; and if we see a paramount intent that it shall operate as a present lease or demise, it must be so construed." That is the true principle, resulting from all the previous cases on the subject. In that case, however, the tenancy had commenced on a day previous to the execution of the instrument; and the tenant agreed to pay the rent in the mean time, and until the lease should be executed, and to hold the premises subject to the covenants or stipulations contained in the agreement, and on the same terms as if the lease had been actually executed. Here, however, there were no words of present demise, neither does it appear that the plaintiff ever took possession; and, although the defendant agreed to let the premises on the 11th *September*, for the term of ten years, yet it is not expressed when the term was to commence, or the rent was to be paid; and as the defendant, the lessor, agreed to build a brewhouse and cellar at his own expense, it would be inconsistent if the instrument

(a) 3 Moore & Payne, 497.

were held to amount to a present demise, as the landlord had a right to enter for the purpose of building. He was in possession at the time the agreement was entered into, and the rent was to commence and be paid for the whole of the premises, *viz.* when the erections were completed. The lessee was not to lay out any money in repairing the premises, but the lessor alone; and there was no stipulation by the former to pay rent till the brewhouse and cellar were completed. The plaintiff, in his declaration alleges, that the defendant refused to let him into possession; no time was specified when possession was to be given, or the payment of rent was to commence; and as it was an entire rent for the whole of the premises, it could not begin to run until the additional buildings were erected. The sum of 4*l.* paid by the defendant to the plaintiff in earnest, was meant to bind the bargain until a more formal instrument was executed:—and as Lord Chief Justice *Abbott* said in *Dunk v. Hunter*, “Looking at this instrument, I cannot infer when the tenancy was to commence, or the rent to become due.” Here, however, it must be assumed, that the parties meant that the tenancy was not to commence, or the rent to be payable, until the defendant had performed his part of the agreement, by erecting additional buildings at his own expense.

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Lord Chief Justice TINDAL.—We must endeavour to collect the meaning of the parties from the words of the instrument itself, because there is no evidence of any collateral fact to assist us in the inquiry. Did then the parties intend that the agreement in question should operate as an immediate or present demise? It begins thus:—*George Fox* does this day agree to let,” which is in terms an actual letting. The word *agree* will not of itself exclude the inference of a present demise, where there is nothing else to shew that such a demise was not intended. But here the words ‘this

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day' can only refer to the 11th *September*, 1830, that being the day on which the instrument purports to bear date, and the whole of the sentence is—" *George Fox* (the defendant) does this day agree to let *John Stanforth* (the plaintiff), the whole of his premises situate in *Spring Street, Sheffield*, for the term of ten years." When, then, was that term to commence? We can only fix the commencement from the day of the date of the instrument. The demise, therefore, was a demise from that day; and although the defendant, as landlord, agreed to build a brewhouse and make a cellar at his own expense, yet the rent was to be paid half yearly; and, as there was no stipulation that the payment of such rent was to be deferred to a future period, we must take it that the rent commenced from the day the agreement was made. This, therefore, distinguishes the present case from that of *Dunk v. Hunter*, where it was expressly stipulated that the tenant was to enter upon the premises on a future day, and he was also to pay down 50*l.* on such entry, and if he failed to do so, the term might never have commenced. Here, too, the defendant agreed to pay the ground rent, which was an incumbrance on the premises then actually created and running on, and which cannot have reference to a future time. Besides, it appears, on the face of the instrument, that the defendant had received from the plaintiff 4*l.* in earnest, on the day on which the agreement bore date. Although it is doubtful on what account that payment was made, and the clause itself is of an equivocal meaning, yet it might have been received by the defendant as an equivalent for the ground rent, or on account of rent, or independently of a price or sum to bind the bargain. The agreement was evidently drawn up by an unlettered person, and it appears to me that it would not be coming to too violent or precipitate a conclusion to say, that the sum of 4*l.* might have been paid to the defendant in anticipation

of the first half year's rent, particularly as 35*l.* only was to be paid for the whole of the premises. But, without relying too much on that, it appears to me to be sufficient to say, that, as there is no distinct reference to a future letting or a future entry by the plaintiff, and no day is fixed from which the payment of rent is to commence, except from the day of the date of the instrument, it amounts to an agreement for a present demise; and that the parties meant that there should be an immediate enjoyment by the plaintiff; and, therefore, that an immediate interest passed to him. The instrument, therefore, was improperly stamped, and the nonsuit was proper. This rule, therefore, must be discharged.

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Mr. Justice PARK.—I am of the same opinion. There have been various decisions upon this subject, but the cases are not conflicting, as they have been determined upon what appeared to be the intention of the parties, to be collected from the particular instrument before the Court. Agreements or instruments of this description are generally drawn up by persons not in the profession of the law, and where a sum is stated to have been paid in earnest, it, in common parlance, means, that it was paid to bind the bargain; but, here, the 4*l.* might have been received by the defendant in anticipation of the first half year's rent. The case of *Dunk v. Hunter* appears to me to be against the plaintiff. There, the defendant agreed to let on lease, with a purchasing clause, for the term of twenty-one years. If the instrument had stopped there, it might have been a lease, as it amounted to an actual and present demise; but it was afterwards expressly stipulated that the tenant might enter at any time on or before the 11th *February*, 1820, paying, on entry, 50*l.* in ready cash; and the agreement was entered into on the 19th *March*, 1819. It is therefore clear, that that was not a present demise. Here,

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however, there is no stipulation for the plaintiff's entry on a future day, for the words are, that "*George Fox* (the lessor) does this day agree to let *Jahn Stanforth* (the lessee) the whole of his (the lessor's) premises, for the term of ten years." The words "this day" have immediate reference to the date of the instrument; and if a future demise had been intended, it would, in all probability, have been so expressed; for the defendant might have said "for the term of ten years, to commence at or upon a certain day." Although the defendant further agreed to build a brew-house and make a cellar at his own expense, it is merely accessory to, and does not constitute the principal subject of the demise, from which we must infer that the rent was to commence and be payable from the day of the date of the agreement; and as the defendant agreed to pay the ground-rent, which amounted to 4*l.* 0*s.* 3*d.*, and the plaintiff paid 4*l.* in earnest, it might apply to the payment of that rent, or as tantamount to it.

Mr. Justice GASELER.—I am of the same opinion. The words "*agree to let*" and "*let*" mean the same thing, unless there is something in the instrument to shew that a future demise was contemplated, or that the tenant was not to take possession until a subsequent period.

Mr. Justice BOSANQUET.—It appears to me, that this instrument must be considered as an executed demise, and not an executory agreement. There is no difference between the words "*agree to let*" and "*let*," where the relation of landlord and tenant is to commence immediately, or at the time the agreement is entered into. Here, it must be taken that the tenancy was to commence on the day of the date of the agreement, for the lessor on that day agreed to let the whole of his premises to the defendant for the term of ten years. The premises were

described as consisting of three cottage houses, a stable, and victualling house, and all other buildings thereto connected; and although the defendant further agreed to build a brewhouse and cellar at his own expense, yet these buildings were merely accessory to the premises before demised. If the tenancy was not to commence from the date of the agreement, when was it to take place? Although it has been said, that the rent was not payable until after the additional buildings were completed; yet, if the defendant neglected to build, or failed to perform his part of the agreement in that respect, he would have been liable to a cross action. This rule, therefore, must be—

Discharged.

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KEELING and Another v. AUSTIN.

Saturday,
May 28th.

JUDGMENT of nonsuit having been signed in this cause, and the defendant's costs taxed and allowed on the 30th April last, the plaintiff, on the same day, sued out a writ of error, which was allowed, and a copy of the allowance served on the defendant's attorney;—notwithstanding which, he, on the 19th May, sued out a writ of *fiery facias*, under which the Sheriff levied for the amount of the costs so taxed.

The Court will not stay an execution sued out at the instance of the defendant, after the allowance of a writ of error on a judgment of nonsuit, unless the plaintiff or his attorney points out some real error; and the statute 1 Will. 4, c. 70, s. 8, does not alter the practice in this respect.

Mr. Serjeant *Bompas*, on a former day, obtained a rule nisi calling on the defendant to shew cause why the writ of *fiery facias*, and all subsequent proceedings taken thereon, should not be stayed, the writ having been sued out after the service of the allowance of a writ of error.

Mr. Serjeant *Wilde* now shewed cause.—Although, by

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the statute 6 *Geo.* 4, c. 96, s. 1, it was enacted, "that, upon any judgment hereafter to be given in any of his Majesty's Courts of record at *Westminster*, in any personal action, execution shall not be stayed or delayed by writ of error or *supersedeas* thereupon, without the special order of the Court or some Judge thereof, unless a recognizance with a condition, according to the statute 3 *Jac.* 1, c. 8, be first acknowledged in the same Court;" yet, that enactment does not apply to a writ of error brought on a judgment of nonsuit. In *Mee v. Hopkins* (a), where the plaintiff, having been nonsuited, brought a writ of error, which the defendant treated as a nullity, and levied execution for his costs, the Court said, that the writ of error was no *supersedeas*, unless the party bringing it shewed them that there was real error. So, in the case of *Evans v. Sweet* (b), where all the previous authorities are collected, this Court held, that, where a plaintiff brings a writ of error on a judgment of nonsuit, they would not stay execution sued out by the defendant for the costs of the nonsuit, after the allowance and service of the writ of error, unless the plaintiff or his counsel pointed out some real or specific ground of error; and that an affidavit by the plaintiff's attorney, that he was advised that there was real error, was not sufficient. The same point was in terms decided in *Bor v. Bennett* (c), where the Court said, that a writ of error on a judgment of nonsuit must evidently be brought for delay and vexation.

Mr. Serjeant *Bompas*, in support of his rule.—In *Hamilton v. Schofield* (d), the defendant having suffered judgment by default, sued out a writ of error, after a rule to compute principal and interest, the action having been

(a) 2 Dow. & Ryl. 208.

(b) 9 B. Moore, 609.

(c) 1 H. Bl. 432.

(d) 6 B. Moore, 45.

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brought against him on bills of exchange, and the Court held that the plaintiff could not take out execution without some express declaration, by the defendant or his attorney, that the writ of error was brought for delay. There, too, the defendant had acknowledged the debt to be due to the plaintiff, both before and after the commencement of the action. A judgment by default is a far stronger case than a judgment of nonsuit, to which a plaintiff may be liable, if his attorney is not in Court at the moment the cause is called on. In *Levett v. Perry (a)*, the Court of *King's Bench* ordered proceedings to be stayed, pending a writ of error on a judgment of nonsuit, and said, that the practice not to stay proceedings pending such writ, must be confined to those cases where the party himself, or his attorney, declares that the writ of error is brought only for delay; and although in *Evans v. Sweet*, this Court refused to stay execution sued out by the defendant for the costs of a nonsuit after writ of error brought, unless the plaintiff pointed out some real or substantial ground of error; yet the jurisdiction of this Court is now suspended, pending such writ, by the statute 1 *Wm.* 4, c. 70, by which a new Court of error was constituted and established; and the 8th section enacts, "that writs of error upon any judgment given by any of the Courts of *King's Bench*, *Common Pleas*, and *Exchequer*, shall thereafter be made returnable only before the Judges, or Judges and Barons, as the case may be, of the other two Courts in the *Exchequer Chamber*, any law or statute to the contrary notwithstanding;" and all further proceedings on writs of error so brought, are regulated by that statute. This Court cannot assume that the writ of error brought by the plaintiff was sued out for delay; and, therefore, the defendant was not entitled to sue out execution pending such writ, a copy of the allowance having been previously served on his attorney.

(a) 5 Term Rep. 669.

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Lord Chief Justice TINDAL.—It appears to me, that the recent act (1 Wm. 4, c. 70,) has not the effect contended for. The only object of the 8th section was to institute and establish a new Court of error, leaving the practice as it before stood. The only question then is, whether this application to set aside the writ of execution and subsequent proceedings thereon, is consistent with former cases. In this Court, for a number of years, *viz.* from the decision in *Box v. Bennett*, and lately, in the Court of *King's Bench*, it has been the practice not to stay execution pending a writ of error on a judgment of nonsuit, unless some real error be pointed out by the party who sues out the writ. Although it has been said, that a plaintiff cannot sue out execution after writ of error brought by a defendant on a judgment by default, and that that is a stronger case than a judgment of nonsuit, yet, upon a judgment by default, the error may be upon the record, and the defendant may take advantage of any defect in his adversary's proceeding; but, on a judgment of nonsuit, the error must have been on the part of the plaintiff himself, and he ought not to be permitted to take advantage of his own defect, unless he shews the Court the ground on which the nonsuit took place, and points out the error in the judgment on which he seeks to set it aside.

Mr. Justice PARK.—Although, in *Levett v. Perry*, the Court of *King's Bench* directed the proceedings to be stayed pending a writ of error on a judgment of nonsuit, though there was no declaration by the plaintiff or his attorney, that the writ was sued out for delay, yet it is now settled both there and in this Court, that execution may be taken out pending a writ of error on such judgment, unless some real error be pointed out. The case of *Kempland v. Macauley* is consistent with that of *Box v. Bennett*; and Lord *Kenyon* said (a)—“In general, the rule

(a) 4 Term Rep. 436.

is, that a writ of error allowed and served operates as a *supersedeas* to an execution, and the Court will stay the proceedings of course; but that is on the supposition, that the party may have some error to complain of in the judgment, which it is right should be examined into before execution is awarded; and, therefore, if it appear plainly and unequivocally to the Court, that the writ of error is brought merely for delay, that reason does not hold." That appears to me to be the true principle; and the case of *Evans v. Sweet* is a direct authority to shew that it was incumbent on the plaintiff to point out his ground of error specifically to the Court.

Mr. Justice GASELEE and Mr. Justice BOSANQUET concurring—

Rule discharged.

SLATER *v.* EMMA MURRAY MILLS.

Tuesday,
May 31st.

A RULE was obtained by Mr. Serjeant *Wilde*, on a former day in this term, calling on the plaintiff to shew cause why the bail bond which had been given in this cause should not be delivered up to be cancelled, and a common appearance entered for the defendant, on affidavits made by herself and her husband, that she was a married woman; that she was arrested at the suit of the plaintiff upon her acceptance of a bill of exchange; and that both the plaintiff and his attorney knew that she was married before the arrest took place; and that the plaintiff had applied to the husband for payment of the bill when it became due.

A married woman having been arrested by the indorsee upon her acceptance of a bill of exchange, and the drawer knew that she was married at the time of the acceptance, but she then said that she had property of her own, and would pay the bill when due:—the Court ordered the bail bond to be delivered up to be cancelled, on payment of the costs of the application by the defendant.

Mr. Serjeant *Taddy* now shewed cause on affidavits,

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which stated, that the bill was accepted by the defendant for the schooling of a son she had by a former husband of the name of *Murray*, and that the schoolmistress to whom the bill was given indorsed it to the plaintiff, who gave full consideration for it; that the defendant had been in the habit of paying for the schooling of the child by giving her acceptances in the name of *Emma Murray*, under which she passed during her widowhood, and previously to her marriage to *Mills*; that she accepted the bill in question in the name of *Emma Murray Mills*, when the schoolmistress, having been apprized of the marriage, requested the defendant's husband, Mr. *Mills*, to give his acceptance, upon which the defendant said that she had property of her own, which had been left her by Mr. *Murray*, and that, as the expenses were incurred in educating the child which she had by him, she would provide for the bill when it became due. The learned Serjeant referred to the case of *Luden v. Justice (a)*, where a married woman having contracted a debt for the education of her child, without disclosing her marriage to the plaintiff, and afterwards acted with duplicity, in eluding payment, the Court refused, on motion, to order a bail bond, which had been given on her account, to be delivered up to be cancelled, but left her to plead her coverture. So, here, the Court will not interfere and relieve the defendant on this summary application, as she told the drawer of the bill that she had property of her own, which had been left her by her former husband, and that she would pay the bill when it arrived at maturity.

Mr. Serjeant *Wilde*, in support of his rule.—This case is distinguishable from that of *Luden v. Justice*, as there the plaintiff did not know that the defendant was a married woman at the time the greater portion of the debt for

(a) 8 B. Moore, 346; S. C. 1 Bing. 344.

which she was arrested was contracted; and her husband had died before she made the application for her discharge. Besides, at that time she had left this country, and was residing out of the jurisdiction of the Court. Here, however, the fact that the defendant was married at the time she accepted the bill, and that the drawer was aware of it, is undisputed, and the plaintiff applied to the husband for payment when the bill became due. No misconduct or duplicity can be attributed to the defendant; and as the drawer knew that she was a married woman at the time she accepted the bill, she took it with all its consequences; and it is expressly sworn that both the plaintiff and his attorney were aware of the coverture before the arrest was made.

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Lord Chief Justice TINDAL.—It appears in this case that the fact of coverture is placed beyond dispute, and if the parties were to go down to trial on that plea, there can be no doubt of the result, so that all the intermediate expenses attending such plea would be thrown away. As the drawer of the bill knew that the defendant was married at the time she accepted it, and the plaintiff was also aware of that fact before the arrest, it seems to me that this is a fit case for the Court to interpose; but as the defendant induced the drawer to take the bill, by representing that she had property of her own, and that she would pay it when due, it seems to us that this rule must be made absolute without costs. We do not mean to impugn the authority of the case of *Luden v. Justice*, which was decided under peculiar circumstances, and my brother *Park*, in giving his judgment, placed much reliance on the circumstance that the defendant was residing in *Scotland*, and out of the jurisdiction of the Court.

Per Curiam.

Rule absolute, without costs.

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If a horse have manifest and visible defects at the time of sale, they are not included in a general warranty. Where, therefore, on the sale of a race-horse, the seller told the purchaser that the horse was a crib-biter, and he also had a splint, which was apparent:—*Held*, that a warranty that the horse was sound, wind and limb, at the time of the sale, did not extend to those defects. And it having been left to the Jury to say whether the horse was fit for ordinary purposes;—*Held* to be improper, as the question for their consideration was, whether the horse was, at the time of the sale, sound wind and limb, saving those defects which were visible and known to the parties; and the Court directed a new trial.

MARGETSON v. WRIGHT.

THIS was an action of *assumpsit* for the breach of a warranty of a race-horse named *Sampson*. At the trial, before Mr. Justice *J. Parke*, at the last Assizes at *Appleby*, it appeared that in *January*, 1830, the plaintiff, an attorney, called on the defendant with a view to purchase his horse *Sampson*. That he examined the horse, which had a splint on the off-fore leg, which the defendant told the plaintiff he had thrown in training; and the defendant also said, that he was a crib-biter, and that he had been withdrawn from running for a plate at the *York* races, on account of the splint:—that if he were sound in every respect he would not take less than 500*l.* for him, but that in consequence of those defects he would sell him to the plaintiff for 90*l.*; that the plaintiff agreed to give that sum, if the defendant would warrant that the horse would stand training, which he refused to do: that the plaintiff then galloped him four miles, and having examined the splint on his return, and found that the horse was not at all lame, he drew out the following memorandum of agreement:—

“Mr. *Margetson* agrees to buy Mr. *Wright's* horse *Sampson*, to pay him 40*l.* on delivery of the horse, and the further sum of 50*l.* on *May* day next, and also to give Mr. *Wright* 10*l.* a-time for the first five times the horse should win races in 1830. And the said Mr. *Wright* doth hereby warrant the said horse to be sound wind and limb.”

The defendant, however, refused to sign this agreement, unless the words “*at this time*” were added after those of “wind and limb,” to which the plaintiff assented; and on their being inserted, the defendant signed the agreement. The horse was afterwards sent to the plaintiff, who immediately put him into a course of training; but he soon

became lame; and, at the expiration of six months, broke down; when the plaintiff returned him to the defendant, and afterwards commenced the present action.

The learned Judge told the Jury, that the conduct of the defendant appeared to have been fair and honourable; and he left it to them to say, whether, at the time of the warranty, the horse was sound, and fit for ordinary purposes, and capable of doing ordinary work; and he intimated an opinion, that, as the defendant had expressly warranted the horse to be sound wind and limb, he was responsible for the consequences of the splint; and that, as it was a defect of a doubtful nature, and might or might not have rendered the animal unsound, and there was no implied exception in the warranty, the defendant must be bound by the terms of it. The Jury found a verdict for the plaintiff.

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Mr. Serjeant *Wilde*, in the last term, obtained a rule nisi, that this verdict might be set aside and a new trial had, on the ground of a misdirection by the learned Judge to the Jury, and a misconstruction of the terms of the warranty. The splint was not only a visible defect, but the plaintiff was apprized of it by the defendant, and also of the consequences that had resulted from it; it therefore ought to have been excluded from the warranty. Although the splint might not render the horse unsound at the time of the sale, yet the plaintiff must have known that it would in all probability ultimately produce lameness; it therefore should have been left to the Jury to say, whether there might not have been an implied exception of the splint and its consequences, particularly, as the defect was known to the plaintiff before he made the purchase. Besides, the defendant refused to sign the warranty unless the words "at this time" were inserted. The warranty therefore was confined to the soundness at time of the sale, and cannot

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be extended to contingencies that might arise afterwards. Although the words "sound wind and limb," are equivocal in themselves, yet, if applied to a race-horse, they must be taken to mean that the animal was in health at the time, and not that he was fit for the purposes of an ordinary horse, such as a hack or a roadster. The plaintiff purchased the horse with a view of running him, and he put him into training accordingly. The intention of the parties at the time of the bargain was a question for the Jury; and as the defendant told the plaintiff that he would not sell the horse for less than 500*l*. if he were sound in every respect, he bought him at a risk; and although he might have turned out an excellent race-horse, still he might have been a very bad hack.

Mr. Serjeant *Spankie* now shewed cause.—No exception can be engrafted on a written warranty which is in general terms; and the plaintiff, at all events, had a right to have insured to him a horse sound wind and limb at the time of the sale. Although there might have been a visible defect, it is not to be assumed that the warranty was not to extend to it. A splint is not obvious to every eye, and the defendant intended that the warranty should extend to all the consequences that might result from it. The horse should certainly have been fit for every ordinary purpose; and as it was doubtful whether he would recover from the splint, the plaintiff required a warranty; and, as he broke down in training a short time after he had him, it must be presumed that he was not sound when the plaintiff agreed to purchase him. Although it has been said, that the warranty cannot be taken to extend to a patent or manifest defect; yet, crib-biting and a splint are defects of an equivocal nature, and which might ultimately lead to unsoundness, against which the plaintiff meant to guard himself; and the terms of the warranty are sufficiently large to embrace every species of unsoundness at the time of the

bargain; and the true question for the Jury was, whether the horse was ordinarily sound or fit for general purposes at that time. In *Fell v. Hardwicke*, which was tried at *Guildhall*, at the Sittings before the last Term, Lord *Tenterden* ruled, that a rank crib-biter was an unsound horse, because it interfered with his general health (a); and here there was no exception in the warranty as to crib-biting, which might eventually render the horse unsound.

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Mr. Serjeant *Wilde* and Mr. Serjeant *Jones* in support of the rule.—Crib-biting is not in itself an unsoundness, although it is a vice which may lead to it; it only tends to produce indigestion; and here the horse was in good condition at *the time of the sale*, to which alone the warranty can be taken to extend. The words sound wind and limb, mean that the animal had no bodily ailment. No horse can be fit for two different and distinct purposes, and a mere roadster can never be used as a race-horse, nor would a party think of training him for that purpose; it was therefore improperly left to the Jury to say, whether the defendant's horse was fit for all ordinary purposes or ordinary work; it should have been left to them to consider, whether he was fit for the particular purpose for which he was intended, namely, a race-horse. The defendant did not state that the horse was fit for immediate use, or that he was perfectly free from disease at the moment, or that he had recovered from the splint which the plaintiff examined, and which had been made the subject of a previous discussion between the parties. The introduction of the words "at this time" clearly shews the intention of the defendant, and cannot be taken to extend to a warranty that the horse should stand training thereafter; and although the splint might have produced unsoundness when the horse had been put in a second course of training, it is quite

(a) But see *Broennenburgh v. Haycock*, Holt's Ni. Pr. Cas. 630.

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clear that it did not amount to an unsoundness *at the time* of the sale.

Lord Chief Justice TINDAL.—The question in this case is, whether the direction of the learned Judge to the Jury was, on the evidence and facts proved at the trial, a proper direction. The action was brought for the breach of a warranty of a race-horse, the terms of which were—"and the said Mr. *Wright* (the defendant) doth hereby warrant the said horse to be sound wind and limb, at this time." Two subjects, which might or might not have been the ground work, or have become a source of unsoundness, *namely*, crib-biting, and a splint on the off-fore leg, were discussed by the parties at the time of the bargain, and, after that discussion, the warranty in question was given. It is laid down in the older books, that where defects are apparent at the time of a bargain, they are not included in a warranty, however general the terms may be, because they can form no subject of deceit or fraud; and, formerly, the mode of proceeding for a breach of warranty was by an action of deceit grounded on an express fraud, and the averment in the declaration was *warrantisando vendidit*. Although, however, certain exceptions may be engrafted on a contract of warranty, yet in this case no fraud or deceit can be attributed to the defendant, as the horse's defect was manifest, the splint not only being apparent, but made the subject of discussion before the bargain was made. If a person purchase a horse, knowing it to be blind, he could not sue the seller on a general warranty of soundness, although he had warranted the animal to be sound in every respect. The splint was known to both the plaintiff and the defendant, and the learned Judge left it to the Jury to say, whether the horse was fit for ordinary purposes. His direction would have been less subject to misapprehension, if he had left it to them, in the terms of the warranty, to say, whether the

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horse was, at the time of the bargain, sound wind and limb, saving those manifest and visible defects which were known to the parties. The Jury might then have considered whether the effect which might be produced by the splint, was contemplated or not. It seems to me, therefore, that the direction of the Judge was in too general terms, and the Jury might have been in some degree misled by it; and that the purposes of justice will be better attained, by sending the cause down to another Jury.

Mr. Justice PARK.—I am of the same opinion. Although I feel great reluctance to grant a new trial in an action of this description, yet I concur with my Lord Chief Justice, that the question left to the Jury, whether the horse was fit for ordinary work at the time of the bargain, was not the proper question. I also fully agree with the proposition stated by his Lordship, *viz.* that defects which are manifest and apparent, such as blindness, are not included in a warranty; and here, the splint was not only visible, but known to both parties at the time of the bargain.

Mr. Justice GASELEE concurred.

Mr. Justice BOSANQUET.—The question is, whether, at the time of the contract and warranty, the horse was sound as a race-horse, with the exception of those defects which were manifestly apparent to and known by the parties, and not whether the horse was fit for the ordinary purposes of the road. The rule for a new trial must, therefore, be made—

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The plaintiff and defendant were partners as attorneys; independently of the partnership account, there was a private separate account of moneys due from the defendant to the plaintiff; to recover the balance of which, the plaintiff sued the defendant in *assumpsit*, and declared on the common money counts. It had been previously agreed between them, that the plaintiff should accept a gross sum for interest on the private account, to be made up to a certain day, that the plaintiff would accept $2\frac{1}{2}$ per cent. for interest on the private account from that date for six months, and that after that period the interest was to be 5 l. per cent.; that the defendant's share of the partnership money then in the plaintiff's hands should be applied in liquidation of the balance of the private account; but that the amount of all the bills due to the firm should be received by the plaintiff, and applied in the first instance to discharge certain partnership liabilities, and then in discharge of the balance due from the defendant to the plaintiff on the private account:—*Held*, that the effect of the agreement, as far as it regarded the private account, was to insure to the plaintiff the right to have the defendant's share of the partnership moneys, whenever ascertained, applied in discharge of his separate claim upon the defendant; and that there was nothing to suspend the plaintiff's right of action against the defendant for the recovery of the balance of the private account.

SIMPSON v. RACKHAM.

THIS was an action of *assumpsit*. The declaration contained counts for money lent, money paid, money had and received, and on an account stated. The defendant pleaded the general issue, and a set off for work, labour, and attendances as an attorney.

The cause came on for trial before Mr. Justice *Gaselee*, at the last Assizes at *Thetford*. The facts are so fully and accurately detailed by Mr. Justice *Park*, in delivering the judgment of the Court, that it is only necessary to state, that a verdict was entered for the plaintiff for 5,950 l., with leave to the defendant to move to set it aside and enter a nonsuit, in case the Court should be of opinion that the plaintiff had commenced his action prematurely; which would depend on the construction of certain agreements entered into between the plaintiff and defendant, who had been in partnership as attorneys at *Norwich*.

Mr. Serjeant *Wilde* in the last Term obtained a rule *nisi* accordingly, and submitted, that the plaintiff's right of action against the defendant was suspended by those agreements, until a final adjustment had been made of the partnership and other accounts which subsisted between them, and which were unsettled at the time of the commencement of this action.

Mr. Serjeant *Taddy* and Mr. Serjeant *Bompas* afterwards shewed cause; and, Mr. Serjeant *Wilde* and Mr. Serjeant *Jones* having been heard in support of the rule, the Court said, that they would look into the agreements, as the question depended entirely upon the legal construction to be put upon them as well as the intention of the parties at the time they were entered into.

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Cur. adv. vult.

Mr. Justice PARK (a) now delivered the judgment of the Court, as follows:—

This case was tried before my brother *Gaselee*, and there was a verdict for the plaintiff. It now comes before us upon a motion to set aside that verdict, and to enter a nonsuit.

The plaintiff and the defendant were partners as attorneys and solicitors, and there were various accounts subsisting between them relative to several different terms of partnership in which they had been engaged. But, independently of these partnership accounts, there was a private account of moneys due from the defendant to the plaintiff; to recover the balance of this separate account the present action was brought, in which a verdict has been found for the plaintiff for the sum of 5,950*l.* 13*s.* 10*d.*; and the only question now to be considered is, whether the right of the plaintiff to recover this balance has been suspended by any agreement between the parties? Unless some agreement to this effect can be shewn, the plaintiff's right to recover must be admitted.

Three agreements have been referred to. The first, dated the 9th *March*, 1827, is contained in certain answers made by the plaintiff to proposals of the defendant, and agreed to by both parties. The plaintiff, in the first place,

(a) Lord Chief Justice *Tindal* was attending the Lord Chancellor, who had required his assistance, in deciding the case of *Miller v. Travers*.

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agrees to accept a gross sum of 1,300*l.* for interest on the account delivered (that is, the private account) to be forthwith made up to the 1st of *March*, 1827; and no interest is to be claimed by the defendant for money in the plaintiff's hands on the partnership account.

This is a mutual stipulation, in which it must be supposed that the parties considered, and acted upon their own views of their respective rights. The plaintiff next agrees, that he will be content to accept two and a half *per cent.* for interest on the account (that is, the same private account), from the same 1st of *March*, for six months; and that, after that period, the rate of interest shall be at five *per cent.* No difficulty appears to have been expected to arise on the items of the account, but it is agreed, that if there should be any, it should be referred to an arbitrator. Some difference having arisen upon certain items of the account, they were referred to an arbitrator, who ascertained the balance. By the stipulations above mentioned, the sum to be received for interest to the 1st of *March*, and the rate of interest which the account was afterwards to bear, are ascertained; but there is no provision by which the plaintiff is restrained from calling for his debt with interest, according to the stipulated rates, or the defendant from paying it with interest at such rates, according to the convenience of the respective parties. The agreement then goes on to say, that the defendant's share of the partnership money then in the plaintiff's hands, on account of certain periods of seven years and ten years then making up, should be applied in liquidation of the balance, *viz.* of the private account; but that all the bills to be received should be taken by the plaintiff, and applied, in the first place, to discharge the agents' bills and any other claims on the business account, and then in discharge of the balance due from the defendant to the plaintiff.

The effect of this stipulation appears to be, to provide that all claims upon the partnership shall first be dis-

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charged, before either party shall have any claim upon the funds; and that no part of the surplus shall be paid over to the defendant till the whole of his private debt to the plaintiff shall have been paid; a stipulation which appears to be reasonable enough, it being apparent that the defendant was largely indebted to the plaintiff.

The plaintiff then consents that certain business arising out of his affairs of town-clerk and clerk of the peace shall be brought into the partnership account; that the defendant shall be allowed to draw for certain sums to a considerable amount, which are to be settled at the end of each year; that from the said 1st of *March*, 1827, the former proportions of profits shall cease, and the business be equally divided, the plaintiff being allowed to charge 100*l. per annum* for rent, taxes, &c. That the plaintiff shall in consequence be paid interest at the rate of five *per cent.* on the advances to the defendant before mentioned, and that moneys advanced by either party to the partnership shall be repaid at five *per cent.* That the partnership may be dissolved on any first of *January*, by either party giving six months' notice; but that the concessions respecting the interest, and otherwise, must be considered to be made by the plaintiff, in the expectation that the partnership be not dissolved on the 1st of *January* then next.

The second agreement, of the 17th of *April*, 1828, is no further material, than as it recognises the right of the plaintiff to retain the defendant's share of the partnership moneys under the agreement of the 9th of *March*, 1827.

On the 11th of *August*, 1828, an agreement was entered into between the plaintiff and the defendant, by which it was provided that the partnership should be dissolved on the 1st of *September* then next; and provision is made for completing the accounts to the 1st of *March*, 1827, by certain persons therein named:—if any differences should arise between them respecting the accounts, the disputed point was to be referred to a barrister, whose determination

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was to be conclusive, and the balance which might appear to be due to the defendant was to be carried to his credit on the private account. The partnership account, from the 1st of *March* to the dissolution, was to be examined in like manner, and the plaintiff repaid his advances, with interest at five *per cent.* on the bills to be received; it was then provided—that the defendant should immediately proceed to complete all the partnership bills and accounts, up to the time of the dissolution, pursuant to the agreement of the 9th of *March*, 1827, and that the plaintiff should be at liberty to approve of all, and to make out any bills which he might think proper, and that the defendant's share of all the money to be received should be carried to the credit of his private account, until that account should be discharged, when the money was to be divided between the parties, according to their respective shares; and the defendant was to be allowed for his trouble, and for clerks and incidental expenses, four *per cent.* on the gross amount received, to be paid or allowed to him out of the partnership assets.

This agreement contemplates the case of the defendant, after the dissolution, completing the accounts to that time, and provides, as before, that he shall not be entitled to take to himself any part of his share of the partnership money till he shall have discharged the amount of his debt to the plaintiff, on the private account. Then there is a provision for allowing 250*l.* to the defendant on his private account, in satisfaction of his demand for extra trouble:—and, lastly, it is provided, that nothing contained in that agreement shall in any manner alter or affect the agreement entered into on the 9th of *March*, 1827, but that the same shall in all respects be fully performed.

These agreements are not so accurately and perspicuously drawn as perhaps they might have been; and, therefore, they have obliged us to take a very deliberate consideration of them.

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At first view, it seemed difficult to say, that the parties could have intended that the plaintiff should be at liberty to maintain an action against the defendant as soon as the deed of *March*, 1827, was entered into, and yet to retain and receive such large sums of money, to be applied in liquidation of the demand; and a greater colour also was given to such a doubt, because, by the stipulation of interest at two and a half *per cent.* for six months, it seemed probable that it was in the contemplation of the contracting parties to suspend any proceeding at law for that period at least. And one of my learned brothers has still some little difficulty; but those doubts are not sufficient in his judgment to induce him to come to a different conclusion from the rest of the Court. For, on the other hand, it is certainly quite clear that there is no precise stipulation for a suspension, and, therefore, how can the Court say to what period that suspension should extend? The stipulation, also, that the defendant's share of the partnership assets, when received by the plaintiff, should go in discharge of the private debt, is an advantage to the defendant, for it gives him a legal set-off to that extent; whereas, without such stipulation, the plaintiff might have sued for the whole private debt, and left the defendant to a suit in equity to recover his share. This seems another reason for not considering any thing in the agreement as amounting to a suspension. If, then, the agreement of the 9th of *March*, 1827, did not amount to a stipulation to suspend the plaintiff's right to sue on the private account, there seems to be no ground for contending that the last agreement, of the 11th of *August*, 1828, had that effect.

The effect of both these agreements, so far as regards the private account, seems to be, to insure to the plaintiff the right to have the defendant's share of the partnership moneys, whenever ascertained, applied in discharge of his separate claim upon the defendant, in consideration of

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certain concessions made by the plaintiff, without restricting the right of the plaintiff to enforce his claim by action, whenever he should think fit to resort to that remedy. And any delay which may have been occasioned in making up the partnership accounts, and ascertaining the defendant's share of the partnership moneys, will not afford any legal ground for suspending the plaintiff's right of action for his separate debt. If this be, as we think upon full consideration it is, the right view of the case, the rule must be

Discharged.

We, however, are extremely desirous that the parties should come to some amicable adjustment, and strongly recommend that the whole of the accounts should be referred to a barrister; and although the plaintiff may enter up judgment as a security, the execution may be suspended till a final arrangement be made.

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CAUNT v. WARD.

A testator left an annuity of 20*l.* a-year each to two female servants. One of the annuitants married in the life-time of the testator, upon which, he, by a codicil, directed her annuity to be paid to her sole and separate use, independently of her husband. The other annuitant, who did not marry till after the testator's death, took under his will, by which the annuity was payable to her without any restriction. Her husband having become insolvent:—*Held*, that the annuity passed to his assignees.

THIS was an action of replevin, for taking the plaintiff's goods. The defendant made cognizance as bailiff of *Thomas Henson* and *Sarah* his wife, that one *William Hornbuckle*, before and at the time of making the devise thereinafter next mentioned, and from thence continually, until and at the time of his death, was seised of the said messuage or dwelling-house, in which &c., with the appur-

tenances, in his demesne as of fee; and that, being so seised, the said *William Hornbuckle*, long before the plaintiff had any thing in the said dwelling-house, in which &c., to wit, on the 31st *August*, 1811, made and published his last will and testament in writing, which was duly executed and attested to pass real estates; and thereby declared his mind and will to be, that, in case *Elizabeth Bates*, and the said *Sarah Henson*, then called *Sarah Bates*, who were then in his service, should continue in the service of his sister, *Elizabeth Hornbuckle*, until her decease, and should conduct themselves towards her with the like good conduct they had been accustomed to do towards him the said *William Hornbuckle*, then, and in such case, the said *William Hornbuckle* did thereby give and devise unto them the said *Elizabeth Bates* and *Sarah*, the respective annual sums of 20*l.* each, free and clear of all deductions whatsoever, for and during the terms of their respective lives, such payment to commence from the day of the decease of the said *William Hornbuckle's* sister *Elizabeth*, and to be paid to the said annuitants by equal quarterly payments; and the said *William Hornbuckle* did, in and by his said will, expressly charge and make chargeable the said dwelling-house, in which &c., into whose hands or possession soever the same might thereafter come, with the payment of the said respective annuities of 20*l.* each, accordingly. And the said *William Hornbuckle* did also will and declare, that, in case either of the said annuities, or any part or parts of them or either of them, should at any time continue in arrear and unpaid for the space of twenty-eight days next after the day or time when the same should respectively become due and payable as aforesaid, he did, in and by his said will, authorize, empower, and direct either of them the said annuitants, whose annuity or annuities might be so in arrear, to enter into and upon all or any part or parts of the said dwelling-house, in which &c., and to distrain for such arrears, and to impound, sell,

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or dispose of the distress or distresses that might be taken, in the usual or ordinary way, until the full amount of the arrears of the said respective annuities, and all charges attending the recovery of the same, should have been satisfied and discharged. That afterwards, and whilst the said *William Hornbuckle* was so seised of the said dwelling-house, in which &c., and long before the plaintiff had any thing therein, to wit, on &c., the said *William Hornbuckle* made and published a codicil in writing, to and as a part of his said will, duly signed by the said *William Hornbuckle*, and attested and subscribed in his presence by three credible witnesses, and thereby declared and directed, that, in case the said *Elizabeth Bates* and the said *Sarah*, then called *Sarah Bates*, or either of them, should continue in the service of his said sister, *Elizabeth Hornbuckle*, until her decease as aforesaid, but not otherwise, then the said several and respective annuities or rent-charges should go to and be paid to them the said *Elizabeth Bates*, otherwise *Elizabeth Roe*, (she the said *Elizabeth* having then lately intermarried with *John Roe*, of *Radford Lane*, manufacturer), and the said *Sarah*, for and during their respective natural lives, generally and absolutely, and without any contingency, condition, or restriction whatsoever, save and except as last aforesaid, and save and except that the receipt or receipts of her the said *Elizabeth Roe* should from time to time, and at all times during her natural life, be a good and sufficient discharge, or good and sufficient discharges for the said annuity or rent-charge, to any trustees, or to the other persons liable to the payment of the same, although her husband might not join therein or sign the same, inasmuch as the said *William Hornbuckle* intended the same for her own sole and separate use and benefit, and independent and in exclusion of her said husband; and the said *William Hornbuckle* thereby confirmed his said will in all other parts and respects, save and except wherein he had altered the

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same by the said codicil as aforesaid; and afterwards, to wit, on &c., died seised of the said dwelling-house, in which &c., without having altered or revoked his said will and codicil; after whose death, to wit, on the 17th *January*, 1825, the said *Elizabeth Hornbuckle*, the sister of the said *William Hornbuckle*, also died. The defendant then averred, that the said *Sarah* continued in the service of the said *Elizabeth Hornbuckle* from and after the death of the said *William Hornbuckle* until and at the time of the death of the said *Elizabeth Hornbuckle*; and that, after the death of the said *Elizabeth Hornbuckle*, to wit, on &c., she the said *Sarah* intermarried with the said *Thomas Henson*; and because a large sum of money, to wit, the sum of 10*l.* of the said annuity or rent-charge, for two quarters of a year, ending respectively on the 17th *January* and the 17th *April*, 1830, and from thence continually, and until and at the said time when &c., was due and in arrear from the plaintiff to the said *Thomas Henson* and *Sarah* his wife, the said sum and every part thereof having then been due and in arrear more than twenty-eight days, he the defendant, as bailiff of the said *Thomas* and *Sarah*, acknowledged the taking of the said goods and chattels, in the declaration mentioned, in the said dwelling-house, in which &c., as for and in the name of a distress for the said arrears of the said annuity or rent-charge so due and in arrear as aforesaid.

The plaintiff pleaded in bar, that, after the said intermarriage of *Thomas Henson* and *Sarah* his wife, and before any part of the said annuity or rent-charge so in the said cognizance alleged to have become due and in arrear as aforesaid, became so due and in arrear, to wit, on the 9th *January*, 1829, the said *Thomas Henson*, then being a prisoner in actual custody within the walls of the prison or gaol of *Nottingham*, upon process for debt, did duly, and according to the directions and provisions of the statute 7 *Geo.* 4, intituled &c., apply by petition in a summary way to

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the Court for relief of Insolvent Debtors, for his discharge from such custody, according to the provisions of the said act; which petition was then duly subscribed by the said *Thomas Henson*, and was afterwards, to wit, on the 16th *January*, 1829, filed in the said Court, pursuant to the directions in the said act contained.—The plaintiff then averred, that the said *Thomas Henson* did, at the time of subscribing the said petition, to wit, on &c., duly execute a conveyance and assignment to one *Henry Dance*, he being the provisional assignee of the said Court, of, amongst other things, all the estate, right, title, and interest, in and to all the real and personal estate and effects of the said *Thomas Henson*, being such prisoner as aforesaid, except wearing apparel, &c. &c., not exceeding in the whole the value of 20*l.*; which said conveyance and assignment so executed as aforesaid, did, by virtue of the said act, vest the said several supposed arrears of the said annuity or rent-charge in the said cognizance mentioned, and all the right, title, interest, and trust of the said *Thomas Henson*, of, in, and to the same, in the said *Henry Dance*, as such provisional assignee of the said Court as aforesaid. The plaintiff then averred, that, by an indenture of the 13th *March*, 1829, the said *Henry Dance*, as such provisional assignee as aforesaid, conveyed and assigned all the estate, right, title, and interest of the said *Thomas Henson*, so vested in him the said *Henry Dance*, as such provisional assignee, to *T. B.*, *C. S.* and *T. B. M.*, as the ultimate or permanent assignees of *Henson's* estate and effects; and that thereupon, and by virtue of the said last-mentioned indenture, and the said statute, the said several supposed arrears of the said annuity or rent-charge in the said cognizance mentioned, and all the right, title, interest, and trust of the said *Thomas Henson*, of, in, and to the same, did then and there become and were vested in the said last three mentioned persons, as such assignees as aforesaid.

To this plea the defendant demurred generally, and the plaintiff joined in demurrer.

The cause now came on for argument.

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Mr. Serjeant *Russell*, in support of the demurrer.—As the annuity was payable to the sole use of the wife of the insolvent, before the marriage, he must be considered as a trustee for her, and, consequently, it did not pass to his assignees. It was not a mere beneficial interest in the husband, and it is quite clear that a Court of equity would consider this as a trust estate, and a Court of law will so deem it, with reference to the object and provisions of the Insolvent Debtors' Act. At all events, the assignees can only take it, subject to the wife's interest; and if property be given to a *feme sole*, either expressly or by necessary implication, for her sole use, and she marries, and her husband afterwards becomes bankrupt, it does not pass to his assignees. In *Ex parte Coysegame* (a), where an annuity of 40*l.* was secured by bond to the wife of a person who became bankrupt, and he delivered up the bond to his assignees, the Court, on her application, directed it to be delivered to her trustee, and ordered that she should receive the whole of the annuity for her separate use. Although, in *Bosvil v. Brander* (b), where a *feme sole* mortgagee in fee married, and the husband became bankrupt, it was held that his assignees were entitled to the benefit of the mortgage; yet, the Master of the Rolls was of opinion, that if there had been any articles before the marriage, purporting that the mortgage money should continue as her provision, or be assigned in trust for her, they would have been a specific lien upon the mortgage, and have preserved it from the bankruptcy; and here the annuity was devised absolutely to the wife for her

(a) 1 Atk. 192; S. C. Cooke's Bankrupt Laws, 283.

(b) 1 Peere Wms. 458.

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life. If, from the circumstances of this case, the insolvent can be considered as a trustee for his wife, his assignees will be trustees in the same manner as in *Tyrrell v. Hope* (a), where, in a marriage settlement, an estate was intended to be settled to the separate use of the wife during her life, but, by mistake, was limited to the use of the husband for life; and he gave a note in writing under his hand to the trustee, that the wife should take the estate to her separate use, according to the original intention of the parties; it was held, that the assignees of the husband, he having become bankrupt, must be considered as trustees for the wife, as they took the estate subject to the same right of the wife as she was entitled to against the bankrupt: and here, as the wife had only 20l. a-year for her life, it did not pass to her husband's assignees; and as it was not sufficient to maintain her, she is entitled to receive the annuity for her separate use. Although the words of the 11th section of the statute 7 Geo. 4, c. 57, are most general and comprehensive, and by which all the debtor's right, title, interest, and trust in and to all his real and personal estate and effects, are conveyed to and vested in his assignees, yet those general words must be restrained, in order to effectuate the intention of the Legislature. In *Galliers v. Moss* (b), where a testator, being seised in fee of lands in which he had a beneficial interest, and also of other lands as mortgagee, devised all his lands to trustees, it was held that the legal estate in the mortgaged property did not pass, because, although the words used in the will were sufficient to pass such property, the testator had subjected it to limitations inapplicable to mortgaged property. In *Vandenanker v. Desbrough* (c), where a testator devised a certain sum to be paid after his death to a trustee, in trust, to lay it out and invest it in a purchase for the benefit of the wife of J. S., and he became a bankrupt, the Court

(a) 2 Atk. 558.

(b) 9 Barn. & Cress. 267.

(c) 2 Vern. 96.

held, that this not being any trust created by the husband, nor any thing carved out of his estate, but given by a relation of the wife's, and intended for her support and maintenance, it was not liable to the husband's creditors, and that his assignee had no title to it; and it was decreed, that it should be paid to the trustee, to be laid out in land, and settled according to the will; and here, as the annuity was expressly devised to the wife for her life, it did not pass to the assignees of the husband; and the Court will consider it as trust property, in which the husband has an interest as trustee for his wife.

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Mr. Serjeant *Jones*, *contra*, was stopped by the Court.

Mr. Justice PARK.—We entertain no doubt whatever in this case. The argument for the defendant might have had some weight, if the devise had been to the sole and separate use of *Sarah Bates*. I admit the principle, that trust property does not pass under an assignment to the assignees of a bankrupt or insolvent debtor, but here there is nothing on the face of the pleadings to shew that any trust was raised in the insolvent, or that any settlement was made on the wife at the time of the marriage. The deviser left two faithful female servants an annuity of 20*l.* a-year each, provided they should continue in the service of his sister. One of the annuitants, namely, *Elisabeth Bates*, married in the life-time of the testator, upon which he, by a codicil to his will, directed the annuity to go, and be paid to her, for her own sole and separate use, independent and in exclusion of her husband, and that her receipt should be a good and sufficient discharge to the trustee or other party paying the annuity. The other annuitant, *Sarah Bates*, who did not marry until after the testator's death, took under his will, by which the annuity was payable to her without any restriction or reservation. When, therefore, her husband became insolvent, the property in the annuity passed to his assignees; and

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it is not for us to consider the rights the parties may have in a Court of equity, as we are bound to decide according to law.

Mr. Justice GASELER.—If the wife had been seised in fee of a freehold estate, the husband would have a beneficial interest during their joint lives, which interest would clearly pass to his assignees.

Mr. Justice BOSANQUET.—Although it is quite clear, that a mere trust estate does not pass to the assignees of a bankrupt, or insolvent debtor, yet it does not appear on the face of the pleadings that this is a trust; it is merely a beneficial interest in the husband. The wife took under the will, which does not subject the devise or the annuity to any limitation or restriction.

Mr. Justice ALDERSON.—Whether or not the wife is entitled to have any provision made for her, is a question for a Court of equity to determine; but here, no separate interest appears on the face of the pleadings, which a Court of law can recognise. In the case of *The King v. The Inhabitants of Toddington*, Mr. Justice *Holroyd* said (a)—“Where there is a conveyance to uses not executed, or on trusts stated on the face of the deed, the one party has the equitable, and the other the legal estate; and in these cases, for collateral purposes, a Court of common law will take notice of such an equitable estate. An equitable estate, however, is very different from an equitable right to have a conveyance of the legal estate; and if there be any doubt as to what a Court of equity would do, this Court cannot take cognizance of the estate.” That appears to me to be the true distinction, and it is sufficient for us to say, that we must decide according to law.

Judgment for the plaintiff.

(a) 1 Barn. & Ald. 564.

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Wednesday,
June 1st.

HARDING v. FRANCIS.

MR. Serjeant *Taddy* applied for a rule calling on the defendant's attorney to shew cause why he should not pay to the plaintiff the amount of the debt due to him from the defendant, together with the costs already incurred in this action. The motion was founded on an affidavit, which stated, that in *January*, 1830, the plaintiff sued out a writ of *capias ad satisfaciendum* against the defendant, which was sent to the sheriff of *Glamorganshire* to be executed. That the defendant had property and resided in that county, but that the under-sheriff sent the process to the defendant's attorney, instead of putting it into the hands of one of his own officers; and that the attorney had refused to make any levy, or act under the writ, although he had been frequently requested by the plaintiff's attorney so to do. The learned Serjeant submitted, that as the plaintiff had no remedy against the Sheriff, as the process was never in the custody of his bailiff, and the defendant's attorney had been guilty of misconduct in not making the levy, or directing it to be made, he was liable to the plaintiff for the amount of the debt.

The plaintiff, having sued out a writ of *capias ad satisfaciendum*, against the defendant, sent it to the Sheriff to be executed. The under-sheriff sent the writ to the defendant's attorney, who neglected to levy or act upon it:—*Held*, that the attorney could not be called on by a summary application to pay the plaintiff the amount of the debt, as his remedy in the first instance was against the under-sheriff, for having delivered the writ to the defendant's attorney, instead of his own officer.

But the Court held, that, as the under-sheriff had improperly parted with the process to the defendant's attorney, and as the under-sheriff was *quasi* an officer of the Court, the plaintiff's remedy was against him in the first instance; and that he ought to be called upon to explain his motive for delivering the writ to the defendant's attorney, before the latter could be made responsible for the payment of the debt, on this summary application.

The learned Serjeant, therefore, took nothing by his motion.

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Tuesday,
June 3rd.

WHITAKER v. TATHAM, Executor, &c.

An executor is not entitled to the undisposed of residue of the testator's personal estate, when a specific sum is bequeathed to the executor for his trouble in the execution of the will.

Parol evidence to explain the intention of a testator, as to the disposition of part of his property, must be confined to declarations made by him at or about the time of making his will; at all events, such evidence is not admissible, to shew that the testator meant that his executor should have the residue, when a specific legacy was bequeathed to him for his care and trouble.

THIS was an action by the plaintiff against the defendant, as the surviving executor of one *Randal Wallworth*, deceased. When the cause came on for trial, it appeared that a bill in *Chancery* had been filed against the defendant by one *Jane Dawkins*, who claimed the residue of the testator's property, as his next of kin. It was agreed at *Nisi Prius*, that all matters in difference in this cause, and also the suit in equity, should be referred to a barrister; and it was also further agreed, that *Mrs. Dawkins* should be made a party to the reference; and the order was drawn up accordingly.

The arbitrator afterwards made his award, as follows:—

He found and declared, that *Randal Wallworth* did, on the 14th *June*, 1823, make and publish his will in writing, which was duly executed to pass real estates; and that on the 6th *December*, 1824, he executed a codicil to the will. That the will and codicil were as follows, *viz.*—I, *Randal Wallworth*, of *Barnet*, in the county of *Middlesex*, give, devise, and bequeath, to my executors hereinafter named, all my real and personal estate, upon trust, that they, my said trustees, or the survivor of them, do and shall, with all convenient speed after my decease, satisfy and discharge my just debts, and funeral and testamentary charges; and also pay unto my executors the sum of 20*l.* each for the trouble they will have in the execution of this my will—and then, upon trust, out of the dividends and interest of the said trust moneys, to pay unto my daughter, *Jane Dawkins*, wife of *Nathaniel Dawkins*, for and during the term of her natural life, one annuity or yearly sum of 4*l.* clear of all deductions whatsoever, by half-yearly equal payments; the said annuity not to be subject to the con-

trol or engagements of her present or any future husband ; and her receipt only to be a sufficient discharge to my trustee or trustees for the same ;—the said sum of 46*l. per annum* to be paid out of 1,000*l.* New 4 *per cent.* Annuities, and 6*l. per annum* out of Long Annuities, now standing in my name, in the books of the Governor and Company of the Bank of *England*. And it is my further wish, that the said stock be transferred into the names of *Charles Todd, William Henry Tatham, and Robert Whitaker*, as trustees for the said annuity ; and it is my further wish, that in case *Nathaniel Dawkins* survives his present wife, my daughter *Jane Dawkins*, that they, my hereinafter named exēcutors, do pay unto the said *Nathaniel Dawkins* the sum of 200*l.* as a free gift. And it is my further wish, that in case of the demise of my daughter, the said *Jane Dawkins*, the remainder of my funded property in the New 4 *per cent.* Annuities and Long Annuities, after deducting the said gift of 200*l.*, be divided amongst my great-grandchildren, at my demise in equal proportions, at the discretion of my executors. And I further desire, that my house that I now live in, situate at *Barnet*, and the shares I now hold in the *Hope* Fire-office, be disposed of for the purpose of settling my just debts and demands, as mentioned in the former part of this my will ; and if there should be any money remaining, *my wish is, that my exēcutors do dispose of it agreeably to their own discretion.* Lastly, I do hereby nominate and appoint my friends, *Charles Todd*, of, &c., and *William Henry Tatham* (the defendant), of &c., my executors of this my last will and testament, for the purposes herein expressed, revoking all former wills and dispositions by me made. In witness whereof, &c. &c.

Codicil.—This is my request, that my daughter, *Mrs. Dawkins*, is, at my decease, to have my night-table, coal-box, dining-table, and watch ; my grand-daughter, *Jane Whitaker*, to have both chests of drawers that stand in my

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bed-room and the passage, and likewise my bookcase; and all the rest of the furniture, and whatever remains in the house, to belong to Mrs. *Hughes*.

The arbitrator then found that the said *Randal Wallworth* died on the 23rd *January*, 1825, without altering or revoking his will, except as to the said codicil. That he died before the commencement of the said suit in equity, and that the above will and codicil were proved on the 1st *March*, 1825, by the said *William Henry Tatham* and *Charles Todd*, the executors therein named. That the said *Jane Dawkins*, at the time of the death of the said *Randal Wallworth*, was, and from thence hitherto had been, the next of kin to the said *Randal Wallworth*; and that the several matters and things mentioned in the codicil, were, before the commencement of the said suit in equity, or of this action, delivered by the said executors to the several persons to whom the same were respectively bequeathed by such codicil. The arbitrator further found, that the said *Randal Wallworth*, on several occasions after the making of the said will, and on the last occasion, within a very few days of his death, declared it to be his will and intention, that the said executors in the said will named, should have and take the residue of his property, after satisfying the bequests made in and by the said will and codicil, to and for their own benefit.

The arbitrator then declared as follows:—*viz.* That the executors in the will named were, by the terms of the will itself, entitled to take and retain the said residue to and for their own use and benefit, and also, by the intention of the said *Randal Wallworth*, as declared in manner aforesaid; and that the said *Jane Dawkins* was not entitled to such residue, or any part thereof, or to call upon the said *William Henry Tatham* (the defendant) for any account of the same. But if the Court should be of opinion that the next of kin to the said *Randal Wallworth* was, upon the facts stated in the award, entitled to the residue of the

property of the said *Randal Walkworth*, undisposed of by the will and codicil, or either of them—in such case, the arbitrator awarded and ordered, that the said *William Henry Tatham* should, within two calendar months next after the Court should have so decided and adjudged, pay to the said *Jane Dawkins* so much of the residue as should remain, after deducting the costs and charges of the said *William Henry Tatham* by him incurred in and about the said suit in equity; and also his costs in the above mentioned application, and of the reference and the award.

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Mr. Serjeant *Taddy*, in the last *Hilary* Term, on the part of the plaintiff, as trustee for *Jane Dawkins*, obtained a rule calling on the defendant to shew cause why he should not pay her the residue, after deducting the costs as specified in the award; and the learned Serjeant stated, that the questions for the opinion of the Court, arising out of the facts found by the arbitrator, were—*first*, whether he ought to have admitted parol evidence as to the declarations and intention of the testator? And, *secondly*, whether, under the terms of the will, *Jane Dawkins*, as next of kin to the testator, was entitled to the residue of his estate, or, whether it belonged to the defendant as the surviving executor under the will?

Mr Serjeant *Storks* now shewed cause.—The whole of the residue of the testator's personal estate went to the executors named in the will. The expression of the testator, at the conclusion of the will, that, "if there should be any money remaining, the executors were to dispose of it agreeably to their own discretion," was a precise, absolute, and unqualified gift or bequest, and is not only consistent with the intention of the testator, to be collected on the face of the will, but was expressly proved to be so before the arbitrator; and parol evidence of such intention was properly admitted, and places the question beyond all doubt. The award, therefore, that the execu-

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tors were entitled to take the residue for their own use and benefit, is right, and cannot be impugned. The whole of a testator's personal estate, *prima facie*, devolves on his executor; and where there is no disposition of the residue, if, after payment of the funeral expenses, testamentary charges, debts, and legacies, there be any surplus, it vests beneficially in the executor; and, although it may be said, that an executor is not entitled to the residue, where the testator has given him a legacy, expressly for his care and trouble, yet, in *Gibbs v. Rumsey* (a), where a testatrix, after bequeathing 100*l.* to each of her executors for their care and trouble, gave them all the rest and residue of her personal estate, to be disposed of to such persons, in such manner and form, and in such sum and sums, as they in their discretion should think proper and expedient; it was held to give them an absolute beneficial interest; and, therefore, that neither the heir nor the next of kin had a right to call upon the executors to account for the residue. In the case of *Morice v. The Bishop of Durham* (b), the testatrix bequeathed all her personal estate to the defendant, upon trust to pay her debts, and to dispose of the ultimate residue to such objects of benevolence as he, the bishop, in his own discretion should most approve of; and she appointed him her sole executor; he disclaimed any beneficial interest in himself personally—it was therefore considered as a case of express trust. Here, however, there was no resulting trust to the testator's next of kin; and the *onus* of shewing that he did not intend that the residue of his estate should go to his executors, lies on the plaintiff. In *Bowker v. Hunter*, Lord Chancellor Thurlow said (c)—“In order to make a gift of part a bar to taking the residue, the general gift must make the intent as clear as the other intention is from making him executor; where it will bear another intent, it will not

(a) 2 Ves. & Beam. 294.

(b) 9 Ves. 399; S. C. 10 Ves. 522.

(c) 1 Brown's Chan. Cas. 3rd Edit. 329.

bar him from taking the residue. The fundamental distinction is established, by laying it down, that the rule, *that the executor shall take the residue*, must prevail, unless there is an irresistible inference to the contrary." And here, as the testator, by his codicil, has disposed of part of his household furniture to his daughter and grand-daughter, it must be assumed that he meant, that whatever remained should go to his executors. In *Dicks v. Lambert*, the Master of the Rolls said (a)—"It is now so perfectly settled, that it is unnecessary to repeat the rule, that, making an executor does vest in him the personal estate of the testator, unless a reasonable ground appears upon the will; or, as I see I stated in *Clennell v. Lewthwaite* (b), a strong and violent presumption, that the testator did not intend, by making that executor, to vest in him the residue." In *Clennell v. Lewthwaite*, an unbequeathed residue was decreed to an executor, who was also a legatee, upon the testator's intention appearing in the will and by parol evidence; and the Master of the Rolls said (c)—"A legacy shall exclude an executor, unless evidence can be given to rebut the presumption arising from it; and parol evidence may be given for that purpose." And in *Williams v. Jones* (d), where one executor was left a legacy for his trouble, parol evidence was admitted on behalf of his co-executrix, an infant, to rebut the presumption for the next of kin; and she was held to be entitled to the residue undisposed of. So, here, the declarations of the testator as to his intention to leave the residue of his property to his executors, after satisfying the bequests specified in the will, were not only properly admitted, but the intent is unequivocally expressed on the face of the instrument itself; and the presumption in favour of the next of kin is expressly negatived by the codicil.

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(a) 4 Ves. 729.

(b) 2 Ves. 471.

(c) 2 Ves. 476.

(d) 10 Ves. 77.

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Mr. Serjeant *Taddy* for the plaintiff.—*First*, the executors are excluded by the will from taking any beneficial interest in the residue of the testator's property;—and, *secondly*, parol evidence was not admissible, to rebut a presumption arising on the face of the will in favour of the next of kin. It is an established principle, and a settled rule in equity, that a pecuniary legacy bequeathed to an executor affords a sufficient argument to debar him of the residue; neither can he be entitled to it, when the testator has given him a legacy for his care and trouble, because that is a strong case upon which to raise a resulting trust; not merely on the absurdity of supposing a testator to give a part of the fund to that person for whom he intended the whole; but as it is evidence, that he considered him as a trustee for some other who should be the object of the care and trouble for which the bequest was meant as a compensation; or, in other terms, that the executor is excluded from taking the residue, when the testator has specified and fixed the sum he shall have for his care in executing the trusts of the will. The leading case on this subject is that of *Foster v. Munt* (a), where a testator by will gave legacies to his children and grandchildren, and 10*l.* a-piece to his executors, whom he named, for their care, and made no disposition of the surplus—it was decreed that the executors should be trustees for the children as to the surplus. So in *Rachfield v. Careless* (b), where a testatrix gave her executor 5*l.* for his care in fulfilling her will, the surplus was decreed to the next of kin; and Mr. Justice *Powis* said (c)—“It is a fundamental rule in a Court of equity, that an executor is but a trustee, and, on his dying intestate, so much of the testator's personal estate as remains unadministered must go to the testator's next of kin;—that, where there was an express legacy given to the executor, and no further

(a) 1 Vern. 473.

(b) 2 Peere Wms. 158; S. C. 9 Mod. 9.

(c) 2 Peere Wms. 161.

words, nothing given for his care and pains, parol evidence might in such case be admitted of the testator's intention; but this was not to be minded, where words followed declaring a trust, as where the legacy appeared to be given to him for his care in *fulfilling* his will."

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In *Nourse v. Finch*, Mr. Justice *Buller*, who sat for the Lord Chancellor, took a review of all the previous authorities, and in delivering a most luminous judgment, said (a): "So long ago as the year 1709, the rule in equity was laid down, that, if part is given to the executor, the surplus shall go to the next of kin; and that, upon the authority of all the cases, it is clear, that, if a legacy is given generally to an executor, he shall be excluded from the residue, without strong proof that he was intended to take. Till *Foster v. Munt*, the executor took the whole; but there, 10*l.* being given to the executors for their care, a residue of 5,000*l.* was adjudged to belong to the next of kin; and that case does not warrant the admission of parol evidence to prove intention." In *Clennell v. Lewthwaite*, it was held, that a legacy to an executor for his care, is equivalent to a declaration of trust, and, therefore, that parol evidence is not admissible; and the Master of the Rolls said (b)—"*Foster v. Munt* has decided, that a legacy given to an executor affords a strong and violent presumption to deprive him of the residue." In *Williams v. Jones*, the only question was—whether, where one of the executors who had a legacy for his trouble, and the other had none, the latter was excluded; and the case of *White v. Evans* (c) was there referred to, where one executor, who had a legacy for his care, was held to be a trustee of the residue for the next of kin, and that his co-executor, who had no legacy, was a trustee also; and the Master of the Rolls said—"In this case one is clearly a trustee. The Court will not admit parol evidence where a legacy is

(a) 1 Ves. 356-7.

(b) 2 Ves. 471.

(c) 4 Ves. 21.

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given to an executor for his care and trouble." The case of *Gibbs v. Ramsey* was peculiar in its circumstances, and the decision of the Master of the Rolls is founded on the ground that the bequest to the trustees operated as an absolute power of appointment; "for," said his Honour (a), "they claim, not in the character of executors, but under a direct disposition to them as residuary legatees."—At all events, the bequest to the executors in this case can only apply to the money remaining from the sale of the testator's house at *Barnet*, and his shares in the *Hope Fire-office*, and cannot be extended to the general residue of his estate.—*Lastly*, with respect to the admission of parol evidence to explain the testator's intention, although there are a number of conflicting authorities on this point, yet such evidence must be confined to declarations made by the testator, at or about the time of making his will; and here it appears, not only that the arbitrator admitted declarations of the testator *after* the making the will; but, in one instance, within a very few days of his death. In the case of *The Duke of Rutland v. The Duchess of Rutland*, the Lord Chancellor said (b)—"The allowing parol evidence is exceedingly dangerous, and not to be done in case of discourses at a different time from that of making the will." In *Rackfield v. Careless*, the only parol evidence offered was by the person who made the will, and his testimony was confined to declarations made by the testatrix at the time of the making of the instrument. So in *Nourse v. Finch*, Mr. Justice Buller said (c)—"If this was a new question, I should reject the parol evidence *in toto*, for it is very mischievous, as words easily admit of a colour; but as to all conversations, except what passed at the time of making the will, the case of *The Duke of Rutland v. The Duchess of Rutland* is directly against it."

(a) 2 Ves. & Beames, 297.

(b) 2 Peere Wms. 215.

(c) 1 Ves. 357, 9.

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[Mr. Justice *Bosanquet*.—In *Trimmer v. Bayne*, Lord *Eldon*, in treating of a case where an executor is trustee of the residue for the next of kin, said (a)—“ I fear, there is no probability of saying, parol declarations both previous and subsequent, are not admissible; though Lord *Coke* would hardly have been brought to let them in, as well as declarations at the time. A declaration at the time of making the will is of more consequence than one afterwards; and a declaration after the will, as to what the testator had done, is entitled to more credit than one before the will, as to what he intended to do, for that intention may very well be altered: but he knows what he has done; and is much more likely to speak correctly as to that, than as to what he proposes to do: though these parol declarations are all alike admissible; whether consisting of conversation with people who have nothing to do with it, people making impertinent inquiries, and drawing from him angry answers, or in whatever form, they are all evidence. But they are entitled to very different credit and weight, according to the time and circumstances.”]

Still, such declarations must have reference to the intention of the testator, manifested or expressed by him at the time of making his will; and the true distinction was taken by the Master of the Rolls, in *Langham v. Sanford*, where he said (b)—“ If it be by any medium of proof sufficiently ascertained, what the actual intention was at the time of executing the will, it is immaterial what a testator may, for any reason, have thought proper, at a subsequent period, to declare his intention to have been.” His Honour in that case also said (c)—“ A legacy to an executor for his pains and labour, is a declaration that he is to take the office as an office of burthen; and is not to have the benefit of the estate: the admission of evidence, therefore, of an intention, that he should take the

(a) 7 Ves. 518.

(b) 17 Ves. 453.

(c) Id. 443.

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beneficial interest, would be to contradict the will."—Here, therefore, the defendant, as the surviving executor, is excluded from taking any beneficial interest in the residue of the testator's estate, as he had a specific bequest of 20*l.* for the trouble he might have in the execution of the will.

Lord Chief Justice TINDAL.—This was an action by the plaintiff against the defendant, one of the executors named in the will of *Randal Wallworth*, deceased. At the trial, the cause was agreed to be referred to an arbitrator, and Mrs. *Jane Dawkins* was made a party to the reference, by consent. A bill in *Chancery* had been previously filed by her as the next of kin of *Randal Wallworth*, and by which she claimed to be entitled to the residue of the testator's property. That suit was also made a subject of the reference, and the order was drawn up accordingly, and the arbitrator has made his award, and stated certain facts for the opinion of this Court; and the short question is, whether, upon the construction of the will of *Randal Wallworth*, and the admission by the arbitrator of parol evidence to explain the testator's intention, Mrs. *Dawkins*, as next of kin, is entitled to the residue of his property, or whether it belongs to the defendant as the surviving executor named in the will? It must be admitted, as a general rule, that all the personal property of a testator devolves upon and vests in his executors; and, from an early period to the decision in the case of *Foster v. Munt*, it was held, that an executor was entitled to retain the residue, if it were not otherwise disposed of, although the testator had bequeathed a specific sum to him for his care and trouble in discharging the duties imposed upon him as executor. But, from the time of that decision to the present day, it has been held, almost without an exception, that, where the will contains a specific bequest or legacy to executors for their care and trouble, they are, as to the residue or remaining part of the testator's personal property undis-

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posed of by the will, merely trustees for the next of kin. This rule is founded on reason and good sense; for, it would be absurd to say, that a testator should leave his executors a specific legacy, consisting of a small sum, if they should be deemed entitled to take the whole; or that he should make a bequest to them for their care and trouble, if they could collect the whole of the residue of his estate, and appropriate it to their own use and benefit. Where, therefore, a pecuniary legacy is bequeathed to an executor, it of itself affords a sufficient argument, to debar him of the residue, as to which there is a resulting trust in him for the next of kin. Here, the testator, by his will, devised and bequeathed to his executors upon trust, in the first place, to discharge his debts and funeral charges; and he gave them 20*l.* each for the trouble they would have in the execution of his will. The testator, then, after directing an annuity to be paid to his daughter for life, and, after her death, to the testator's great grandchildren, further desired, that the house that he then lived in, and the shares he then held in the *Hope* Fire-office, might be disposed of for settling his just debts, as mentioned in the former part of his will; and that, if there should be any money remaining, his wish was, that his executors should dispose of it agreeably to their own discretion. But it has been said, that the rule established in *Foster v. Munt* does not apply to this case, because the testator's intention has been ascertained and explained by parol evidence, *viz.* by his own declarations, and by which he stated it to be his will and intention that his executors should have and take the residue of his property for their own benefit, after satisfying the bequests specified in the will; and, therefore, that they are entitled to the residue, as well as the 20*l.* bequeathed to each of them at the commencement of the will, which was a specific bequest for their care and trouble in the execution of the will.

First, as to the admission of parol evidence.—Several

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of the cases which have been cited shew, that, where a specific sum is given to executors for their care and trouble, it of itself affords a strong, if not an irresistible presumption, that the testator did not mean that they should take the whole of the residue, and that parol evidence of his intent in such a case is not admissible. In *Clenell v. Lewthwaite* it was decided, that a legacy to an executor for his care, is equivalent to a declaration of trust, and, therefore, that parol evidence of the intention of the testator in such a case is not admissible. But even where such evidence has been admitted, it has always been received with great caution, and restrained to proof of what was the testator's intention *at the time* of making his will. If it had not been so restrained, and declarations of his intent at subsequent periods had been admitted, the effect would be, to set up a nuncupative, in contradiction to a written and attested will, and to attach greater credit to the former than the latter. Although, therefore, declarations made by a testator subsequently to his will may be received in evidence, yet such declarations must be confined to the intent expressed or manifested by him, and which bore upon his mind at the time of making his will. Here, however, the arbitrator appears to have received in evidence declarations made by the testator at periods long subsequent to the making of his will, and on one occasion within a very few days of his death: but it is not necessary to discuss this point further, as such declarations ought not to have been received at all, the executors having a specific pecuniary bequest made to them for their trouble in the execution of the will.

The next question is, whether, upon the face of the will, there is any specific bequest of the whole of the undisposed of residue of the testator's property to the executors, or whether it ought only to be applied to the residue of the last subject matter bequeathed, namely, the money remaining from the sum raised on the sale or disposal of

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the testator's house in which he resided, and his shares in the *Hope* Fire-office. It appears to me, that the last clause in the will would be altogether unnecessary, if the residue were not to be so confined; for the testator expressly desired, that the house and shares should be disposed of, for the purpose of settling his debts, as mentioned in the former part of his will, and that, if there should be any money remaining, that is, from the sum raised on the sale of the house and the shares in the *Hope* Insurance, his executors might dispose of it agreeably to their own discretion; and, in the previous part of the will, the testator bequeathed the whole of his personal estate to discharge his debts and funeral and testamentary charges. We feel it so difficult to distinguish this case from *Gibbs v. Rumsey*, as far as relates to that particular residue, that we think the defendant, as surviving executor, is entitled to it. The just conclusion, therefore, appears to me to be, that the testator's next of kin is entitled to the general residue, and the defendant to the residue arising from the sale of the house and the shares in the *Hope* Insurance. The arbitrator has not stated the amount of the residue; I therefore think that it should be referred back to him, to ascertain the amount of the sum that was raised on the sale of the house and those shares; and when our opinion is intimated to him, he will have no difficulty in making his award.

Mr. Justice PARK.—This case has been very fully and ably argued, and a reference has been made to all the cases and decisions in Courts of equity which bear upon the question submitted to us by the arbitrator; and we must be bound by those decisions. I rely on the well-known and established rule which has been invariably acted upon since the decision in *Foster v. Munt*, namely, that, where a specific legacy or bequest is given to executors for their care and trouble in the discharge of their duties as such, they cannot take the residue of their testator's personal

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estate for their own benefit. In *Nourse v. Finch*, Mr. Justice *Buller* said (a)—“ Upon the authority of all the cases, it is clear, that, if a legacy is given generally to an executor, he shall be excluded from the residue, without strong proof that he was intended to take.” I also agree with that learned Judge in thinking that it would have been far more safe, if parol evidence had never been admitted to explain the intention or meaning of a testator: but it is quite clear that such evidence must be restricted to declarations made by him as to his intent at or about the time of making his will. If not, we should give effect to a parol or nuncupative will, after the execution of a written and solemn instrument. Here, however, the arbitrator admitted evidence of a declaration made by the testator a few days before his death, which certainly was not receivable, as it does not appear that it had reference to an intention expressed by him at the time of making his will, and it might have been inconsistent with his meaning, when he executed the will. I am also of opinion, that there is sufficient on the face of that instrument to shew, that the testator did not mean that the general residue of his property should go to his executors. The clause respecting the disposal of the house and the shares in the *Hope* Fire-office, is separate and distinct, and the will, as far as it regards the disposition of the general property of the testator, ends with the words “ the sum of 200*l.* as a free gift.” I agree with my Lord Chief Justice, that, on the authority of *Gibbs v. Rumsey*, the executors were entitled to the residue remaining on the sale of the house and shares; but, as it does not appear whether the defendant has any surplus in his hands arising from such sale, it ought to be referred back to him to ascertain that fact.

Mr. Justice GABELEE.—I so fully concur with all the observations that have been made by my Lord Chief Jus-

(a) 1 Ves. 357.

tice and my Brother *Park*, that it is unnecessary for me to repeat them. The case of *Morice v. The Bishop of Durham* does not appear to me to apply, as there the executor was directed to dispose of the ultimate residue to such objects of benevolence and charity as he should most approve of, and he disclaimed any beneficial personal interest; and the other cases have fully established the principle, that a pecuniary legacy bequeathed to an executor, affords a sufficient argument to debar him of the residue, without strong evidence of an intention to the contrary, and that evidence of such intent must be confined to declarations made by the testator contemporaneously with the will.

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Mr. Justice BOSANQUET.—I entirely agree with the rest of the Court as to the application and exposition of the principles by which this case must be governed. The first question is, whether, by any express bequest, the executors took the general residue of the testator's property? He bequeathed to them all his real and personal estate, upon trust to pay his debts and funeral and testamentary charges, and he gave them 20*l.* each for the trouble they would have in the execution of his will. He then declared the trusts, namely, to pay his daughter an annuity of 46*l.* a-year for her life, and that, in case her husband survived her, he was to have 200*l.* as a free gift; and that, in case of the demise of the daughter, the remainder should be divided amongst the testator's great grandchildren, at the discretion of the executors. Then follows this clause—“And I further desire that the house I now live in, and the shares I now hold in the *Hope* Fire-office, be disposed of for the purpose of settling my debts, as mentioned in the former part of my will; and if there should be any money remaining, my wish is, that my executors do dispose of it agreeably to their own discretion.” It is quite clear, that the debts were to be paid out of the sale of the house and shares; and the *money remaining* must be taken

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to apply to the sum remaining from the sale of the latter part of the property, namely, the house, and shares in the *Hope* Fire-office. It appears to me, that the last, being a separate and distinct clause, ought not to govern the whole of the will, or to have such an effect as to give the executors the general residue of the testator's property, particularly, as they had each a specific legacy of 20*l.* for their care and trouble in executing the will. This being an express bequest, it excludes them from taking the residue, unless there be a strong and violent presumption to the contrary. The question then is, whether the parol evidence received by the arbitrator was admissible for the purpose of shewing the intention of the testator. I am of opinion, that it ought not to have been received, and the decisions in the Courts of equity appear to me to be decisive of the question. In *Nourse v. Finch*, Mr. Justice *Buller*, in considering within what limits parol evidence was to be confined in a case of this description, said (a)—“ In a case of *ambiguitas latens* it may be admitted; so, in a case of fraud; perhaps of ignorance or mistake: but it does not follow, that it ought to be allowed to prove the intent in any written paper; but that ought to be collected from the paper itself.” Till *Foster v. Munt*, the executor took the whole. There, 10*l.* being given to the executors for their care, a residue of 5,000*l.* was adjudged to belong to the next of kin. That case does not warrant the admission of parol evidence to prove intention; for the reference there was only to see what the surplus was; and for that parol evidence is proper undoubtedly: both at law and in equity it must be received for that.” In *Clennell v. Lewthwaite*, the Master of the Rolls said (b)—“ that, in *Rachfield v. Careless*, Mr. Justice *Powis* rejected the evidence, or laid no stress upon it, because the legacy to the executor was for his care. And,” said his Honour (c), “ it is clear, that no

(a) 1 Ves. 357.

(b) 2 Ves 473.

(c) Id. 475.

parol evidence of an intention afterwards to give it to the executor will be sufficient; it can be only to shew what was intended at the time he was made executor." The rule, therefore, is clear, that where there is a specific bequest to an executor for his care, parol evidence is not admissible to rebut the presumption arising from such a bequest. But even if it were otherwise, the evidence received by the arbitrator ought not to have been admitted, as it referred to declarations made by the testator long after the making of his will; and no mention was made as to his intent at that time. If such declarations were admitted, it would be productive of the greatest inconvenience, and they ought to be strictly confined to those which had a direct reference to an intent expressed by the testator at or about the time the will was executed. I agree with the Court in thinking, that the justice of the case will be best answered, by referring it back to the arbitrator, to ascertain what part of the surplus in the defendant's hands applies to the house and shares in the insurance office, and he will make his award accordingly.

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A rule to the above effect was accordingly drawn up.

ELIZABETH SIMMONS, by GEORGE SIMMONS, her next
Friend, v. THOMAS NORTON and SARAH his Wife.

Saturday,
June 4th.

THIS was a writ of waste, under the statute of *Gloucester* (6 *Edw.* 1, c. 5), and brought by the plaintiff (an in-

Ploughing up an
old meadow and
converting it to
arable, is waste,
and the tenant

cannot give evidence under the general issue of *no waste done*, that the meadow was ploughed according to the custom of the country, and to ameliorate the land, as the reason for altering the character of the land must be pleaded by way of justification. So, if a tenant for life cut down timber trees, he cannot give in evidence, under the general issue, that they were cut for repairing the premises, or that the lessor consented to exchange one of the trees so cut, it being found to be unfit for the purpose for which it was intruded.

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fant), as reversioner, against the defendants, as tenants for life, for ploughing up meadow land, and converting it into arable, and for cutting down timber trees. The declaration alleged, that although, by the common council of the realm of *England*, it is provided, that it shall not be lawful for any person to make or commit waste of any lands, &c. demised for term of life or for term of years; yet, the defendants did make waste of a certain dwelling-house and garden, lands, and woods, in the parish of *Blaydon*, in the county of *Somerset*, which the defendants, *Thomas Norton* and *Sarah* his wife, in right of the said *Sarah*, held for the term of her natural life, of the plaintiff *Elizabeth Simmons*, from the assignment of one *William Stephens*, to the disherison of the said *Elizabeth*, and contrary to the form of the provisions aforesaid; whereupon the said *Elizabeth*, by *George Simmons*, who is admitted by the Court here to prosecute for the said *Elizabeth*, who is within the age of twenty-one years, as the next friend of the said *Elizabeth*, says, that whereas the said *William Stephens* was seised in his demesne as of fee, and being so seised, he, on the 31st of *December*, 1824, made his will, and thereby devised the premises to the defendant *Sarah Norton*, then *Sarah Harding*, before her intermarriage with the defendant *Thomas Norton*, to hold the premises to the said *Sarah Harding* and her assigns for life, and after her decease, he devised the reversion unto the plaintiff *Elizabeth Simmons* and her heirs, and afterwards died seised, without having revoked his will; after whose death, the defendant, *Sarah Norton*, entered by virtue of the devise, and became seised in her demesne as of freehold for the term of her natural life, and the plaintiff, *Elizabeth Simmons*, by virtue of the same devise, became seised of the reversion as of fee; and the said *Sarah* and *Elizabeth* being so seised respectively, she, the said *Sarah*, intermarried with the said *Thomas Norton*; whereupon the said *Thomas*, and *Sarah* his wife, became and were seised, and still are seised, in

their demesne as of freehold, for the term of the natural life of the said *Sarah*, in right of the said *Sarah*, the reversion then and still belonging to the said *Elizabeth*, and the said *Elizabeth* still being seised of the reversion as of fee; and the said *Thomas Norton* and *Sarah* his wife, in right of the said *Sarah*, and the said *Elizabeth*, being so respectively seised as last aforesaid, the defendants, *Thomas Norton* and *Sarah* his wife, on the 1st of *January*, 1825, and on divers other days and times, did commit great waste in and upon the said dwelling-house, garden, and lands, by permitting and suffering the roof of the said dwelling-house to be greatly ruinous, in decay, out of repair, and exposed to the weather, so that, by reason thereof, divers large quantities of rain water, had, during those days, fallen, and come into the said dwelling-house, and had greatly damaged the timbers, &c.; and also, by ploughing up, digging up, and converting into arable land, divers, to wit, twenty acres of the said meadow land, twenty acres of the said pasture land, and twenty acres of the said orchard land; and by digging up and raising upon, and carrying away off and from the said lands, one hundred cart loads of stones, one hundred cart loads of earth, and one hundred cart loads of gravel, parcel of the said freehold of the said lands and of the inheritance thereof, of great value, to wit, &c.; and by felling, cutting down, and cutting to pieces, on the said lands, and carrying away off the same, divers, to wit, fifty oak trees, fifty ash trees, and fifty elm trees, standing, growing, and being upon the said lands, and parcel of the said freehold and inheritance thereof, and each of them being of great value, to wit, of the value of 10*l.*; and thereby, and by each and every of those acts, neglects, permitting and suffering, as aforesaid, did commit and permit great waste, spoil, and destruction, in and upon the said dwelling-house and lands, to the great disherison of the said *Elizabeth*, and against the form, intent, and effect of the provisions aforesaid, to the

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damage of the said *Elizabeth* of 500*l*. The defendants pleaded the general issue, *namely*, that they did not make or commit any waste, spoil, or destruction, in manner and form as the plaintiff by her said writ and declaration had above supposed. Upon which issue was joined.

At the trial before Mr. Justice *Taunton*, at the last Assizes for the county of *Somerset*, the plaintiff proved that, in 1828, the defendants had ploughed up an old meadow, called the *Little Yeat*, and, in 1829, had ordered two oak trees to be cut down. The defence as to the ploughing was, that the meadow was sour and mossy; that it had been ploughed according to the course of good husbandry, and sown with wheat; that it was afterwards sown with barley, grass seeds, and clover, and laid down again; that it was the custom of the country to plough such land, and take two succeeding crops of grain, and then lay it down to grass again. Some of the defendants' witnesses said, that the land was far better for having been ploughed, and that, if lime had been used, it would have materially improved it. The defendants then offered evidence to shew that they had contracted for one hundred and forty bushels of lime, for the purpose of laying it on the land, but that, on being threatened with this suit, they had countermanded the order. There was conflicting evidence as to the custom, and the learned Judge told the Jury, that he thought it had not been proved; that whether the land had been improved by ploughing, could not be given in evidence under the general issue, as it ought to have been pleaded by way of justification; and he also said, that ploughing up and converting old meadow land into arable was waste, whatever the custom of the country might be, and although the land might have been improved by the course the defendants had adopted; that, although they had contracted for lime, it did not follow that they meant to apply it to the meadow in question. The defence as to the trees was, that they were cut down for the pur-

pose of repairing the roof of the house; and the defendants called a carpenter as a witness, who stated, that after they were felled, one of them was found to be unfit for that purpose; upon which an application was made to the plaintiff's guardian, who allowed it to be exchanged for another tree, which was used in repairing the roof, as well as the other which had been previously cut down. The learned Judge was of opinion, that this was in the nature of a set off, and could not be given in evidence under the general issue. The Jury accordingly found a verdict for the plaintiff, with ten shillings damages for ploughing up the meadow, and ten shillings for cutting down the trees.

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Mr. Serjeant *Russell*, in the last term, obtained a rule nisi that this verdict might be set aside, and a new trial granted, on the ground of a misdirection of the learned Judge to the Jury. It should have been left to them to say, whether the ploughing up of the meadow was according to the rules of good husbandry, and whether or not it had been improved or ameliorated by such ploughing? If it had been, it was not waste; for, in *Rolle's Abridgment* it is laid down (a), that where, by the custom of the country, the ploughing of meadow is good husbandry, and for meliorating the meadow, there, the ploughing of it is not waste. That is an authority expressly in point, and has never been doubted or questioned. With respect to the cutting down the trees, if they had both been applied to repairing the roof of the house in the first instance, it would have been an answer to the action; and as one of them was exchanged with the consent of the plaintiff's guardian, the defendant offered evidence of that fact in mitigation of damages; and in *Rennell v. Wither* (b), which was tried before Mr. Jus-

(a) Vol. 2, 814, pl. 5, l. 47.

(b) Manning's Dig., 2nd edit. 291, tit. "Trespass," (C) (c).

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tice *Abbott*, at *Winchester*, at the *Spring Assizes*, 1818, it was held, that, in an action for cutting down trees, excepted out of a lease, it might be shewn, in mitigation of damages, that the trees were applied towards purposes for which the plaintiff had covenanted to furnish timber by assignment of his bailiff, if there were sufficient timber on the demised premises, or that they were exchanged for other timber used for those purposes. That case is precisely in point, to shew, that the evidence in this case as to the exchange of one of the trees was improperly excluded.

Mr. Serjeant *Wilde* now shewed cause.—*First*, the learned Judge most properly held, that the ploughing up an old meadow is waste, although it might tend to the improvement or amelioration of the land;—so the conversion of meadow land into arable is waste, whatever the custom of the country may be. But evidence of the custom, or of the amelioration of the land, was not admissible upon this issue, as the defendants have merely pleaded the general issue of no waste done; and, if a tenant or defendant intend to justify or qualify an act of waste, done or committed by his own act, it must be pleaded specially, and appear upon the face of the record. Here, the act done by the defendants in ploughing up the meadow, was, *prima facie*, an act of waste; and if they meant to set up or rely on the custom, they should have pleaded it, and also, that the land had been ameliorated or improved by the course of husbandry they had pursued. Although Lord Chief Baron *Comyns* (a) adopts the passage in *Rolle's Abridgment*, yet he omits the qualification of the custom of the country, and states, in general terms, that if pasture be converted to tillage for improvement of the soil, it is not waste. That, however, is contrary to and inconsistent with all the other authorities. In *Coke Littleton* (b), it is laid down—"That if the tenant con-

(a) Com. Dig. tit "Waste," D. 4.

(b) 53. b.

vert arable land into wood, or *e converso*, or *meadow into arable*, it is waste, for it changeth not only the course of his husbandry, but 'the proof of his evidence." Lord Chief Baron *Comyns* adopts that proposition, and refers to *Moore* 101, 2 *Rolle's Abridgment*, 815, l. 4—814, l. 50, in its support. So, if the lessee convert meadow to orchard or a hop garden, though it be melioration, it will be waste (a). Although in *Rolle's Abridgment* it is said (b), that, if pasture be converted to tillage, where it was sometimes pasture and sometimes arable, it is not waste; yet, it was on the ground that it did not change the character of the land; and in *Moyle v. Moyle* (c), it is said to have been adjudged, that if the lessee of a hop ground ploughs it up and sows grain there, it is waste. In *Maleverer v. Spinke* (d), the defendant pleaded that he cut down trees for the melioration of the land, and for the maintenance of husbandry; but the Court thought that the plea was bad, and said—"The tenant cannot do a tort to the inheritance for his own convenience and advantage; for he cannot convert land into wood, or wood into arable land, or *convert meadow into arable land*, and, if he do, it is waste." In the case of Lord *Darcy v. Askwith* (e), the Court said—"The lessee hath no power to change the nature of the thing demised, he cannot turn meadow into arable, nor stub a wood to make it pasture;" and 20 *Hen. 6*, 1, is referred to. In *Cole v. Greene* (f), the converting a brewhouse into tenements of greater value, was held to be waste, notwithstanding the amelioration; namely, by reason of the alteration of the nature of the thing, and of the evidence thereof. In *Young v. Spencer*, Lord *Tenterden* said (g), "it seems to be clearly established, that if any thing be done to destroy the evidence of

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(a) Com. Dig. tit. "Waste," D.
 4; 2 Leon. 174.

(b) Vol. 2, 814, l. 47.

(c) Owen, 67.

(d) 1 Dyer, 35 b.

(e) Hobart, 234.

(f) 1 Lev. 309.

(g) 10 Barn. & Cress. 153.

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title, an action is maintainable by the reversioner. There, in an action on the case by the owner of a house against his lessee for years, for opening a new door, whereby the house was weakened and injured, and the plaintiff prejudiced in his reversionary estate and interest in the premises; and the Jury found, that the lessee had opened the door without leave, but that the house was not in any respect weakened or injured by it, and the Judge thereupon directed a verdict to be entered for the plaintiff with nominal damages; yet, the Court, after argument *in banc*, held, that the plaintiff was not, at all events, entitled to a verdict; but, as his reversionary interest might be injured, although the house itself was not, and that question had not been submitted to the Jury, they directed a new trial: and here, as the defendants changed the character of the land, and they had only a limited right of enjoyment, it was clearly an injury to the plaintiff's reversionary interest; and, although the land might have been improved, still it changed the evidence of the title. But, at all events, evidence of the custom of the country, or of the improvement or amelioration of the soil, was not admissible under the general issue. The distinction is most accurately laid down by Mr. Serjeant *Williams*, in a note to *Greene v. Cole* (a), namely, that, upon the plea of *nul waste*, the defendant may give in evidence any thing that proves it to be no waste, as, that it happened by tempest, lightning, enemies, or the like. But it is no plea, where the defendant has matter of justification or excuse; therefore, where the defendant cut timber for repairs, and used it accordingly, or for necessary botes, such as for fuel, cart-bote, &c., or if the plaintiff gave the defendant leave to cut the trees, these are matters of justification and excuse, which must be pleaded specially, and cannot be given in evidence on the general issue of *nul waste*; and several authorities are referred to in support of that position. Here, therefore, if the de-

(a) 2 Wms. Saund. 238, n. 5.

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defendants meant to rely on the custom of the country, or the improvement of the meadow, by ploughing it up and laying it down again to grass, they should have pleaded it specially, in order that the plaintiff might have notice of the nature of the defence, or the excuse or justification intended to be set up; and although the defendants proved that they had contracted for the purchase of lime, it does not follow that they meant to apply it to the meadow in question. In *Comyns's Digest*, it is laid down (a), that the general issue of no waste done is no plea where the defendant has matter of justification or excuse. Again (b), it is said, the defendant may plead in justification, that he took for repairs, or that he took for the repair of the fences and other necessary uses; or for botes, as for fuel, &c. &c. So, the evidence with respect to the exchange of one of the trees was properly rejected; for it is said (c), that it will be waste if a lessee cuts down trees and sells them, and with the money repairs, or afterwards repurchases and uses for repairs. In *Coke Littleton*, it is said (d), "the tenant cutteth down trees for reparations and selleth them, and after buyeth them again, and employs them about necessary reparations, yet it is waste by the vendition: he cannot sell trees, and with the money cover the house;" and here, as it appeared that one of the trees was not fit for the purpose to which it was intended to be applied, the defendants committed waste in ordering it to be cut down; and although the plaintiff's guardian afterwards allowed it to be exchanged for another tree, evidence of that fact was not admissible under the general issue. The case of *Rennell v. Wither* is distinguishable from the present, as there the plaintiff had expressly covenanted to furnish timber by assign-

(a) Tit. "Pleader" 3, O. 7.

(b) 3, O. 11, 12.

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(c) Com. Dig. tit. "Waste," (D.) 5.

(d) 53. b.

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ment of his bailiff; and the defendant shewed that the trees cut down were applied towards the purposes for which the plaintiff had covenanted to furnish timber; yet here one of the trees was not fit for the purpose for which it was intended, and although the learned Judge in that case thought that the defendant might shew, in mitigation of damages, that the trees were exchanged for other timber, which was used for the purpose for which it was to be supplied, yet it appears that at first he was of a different opinion.

Mr. Serjeant *Russell*, in support of his rule.—It must be admitted that this is a harsh action; and the learned Judge ought not to have directed the Jury, that the ploughing up and converting meadow land to arable was waste, although it might have been ploughed and laid down according to the custom of the country, and though it might have had the effect of improving or ameliorating the land. The passage in *Rolle's Abridgment* has been adopted as an authority, and is not at variance with other decisions. In *Comyns's Digest* (a) it is referred to as establishing the principle, that, if pasture be converted to tillage for improvement of the soil, it is not waste; and *Viner*, in his *Abridgment*, has translated the passage *verbatim*, and treated it as good law. The defendants proved that the grass of the meadow was sour and mossy, that it was ploughed up and laid down again according to the custom of the country and of good husbandry; and, although it must be admitted that converting ancient meadow or pasture into arable is *prima facie* waste, yet such conversion must be permanent; and, if the land be bettered by the ploughing, and *bond fide* laid down again to grass, it will not have the effect contended for, namely, the change of evidence of the lessor's title, as that cannot apply to a mere

(a) Tit. "Waste," (D.) 4.

temporary change; and the true question for the Jury was, whether or not the land had been improved by the course of husbandry the defendants had adopted.

[Lord Chief Justice *Tindal*.—It appears that it was an old meadow which the defendants ploughed up. That is a species of land of peculiar value and character, and it might take a number of years to restore it to its former state.]

In the case of Lord *Darcy v. Askwith* (a), it is said, that it is generally true, that the lessee hath no power to change the nature of the thing demised; he cannot turn meadow into arable, nor stub a wood to make it pasture; but he may *better* a thing in the same kind, as by digging a meadow to make a drain or sewer to carry away water:—and here there can be no doubt but that the meadow was bettered by the ploughing; and as the defendants offered evidence to shew that they had ordered lime, it is but fair to assume that they meant to apply it to the meadow in question, and the evidence as to that fact was improperly rejected; for, in the case of *Doe d. Foley v. Wilson* (b), where a copyholder for life cut down trees, though none were applied to the repair of the premises until after an action of ejectment had been brought for a forfeiture, and the greater number of them still remained unapplied, it was held to be a question for the Jury, whether they were cut *bond fide* for the purpose of repair, and were in a course of application for that purpose; and there being no evidence that they were to be applied to any other purpose, the Court refused to set aside a verdict for the defendant. Here the main question is, whether the inheritance has received any injury from the acts of the defendants, or whether they did not act *bond fide*, and with a view to the improvement of the land; and, although it has been said that evidence of that fact could not be receiv-

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(a) Hobart, 234.

(b) 11 East, 56.

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ed under the general issue, yet that plea admits nothing, but puts the whole declaration in issue, and the defendant may give in evidence any thing that proves the act done to be no waste, or that he has not committed the several acts of waste as alleged in the declaration (*a*); and here the ploughing up of the meadow might or might not be waste; and it was incumbent on the plaintiff to shew that it had caused an injury to his reversion. Admitting that the cutting down of timber trees is *prima facie* an act of waste, which must be justified and pleaded by way of excuse; for instance, if they were applied to the purpose of repairing the premises, yet trees are actually destroyed when severed from the inheritance; but here no injury was done to the reversion, as they were cut down for the express purpose of repairs. In *Barret v. Barret*, Mr. Justice *Richardson* said (*b*), the law will not allow that to be waste which is not any way prejudicial to the inheritance; and although it was held in the case of the *City of London v. Greyme* (*c*), that if a lessee convert a corn mill into a fulling mill it is waste, although the conversion be to the advantage of the lessor; and in *Cole v. Greene* (*d*), that the converting a brewhouse let for 120*l.* *per annum*, into other houses which let for 200*l.* a year, is waste; yet the ground of those decisions was the alteration of the nature of the thing, and of the evidence. So, in the case of *Lord Darcy v. Askwith*, the conversion of arable land into wood was held to be waste, because it not only changed the course of husbandry, but also the proof of evidence; but here the meadow was only changed for a short period, *viz.* for two years; and, in *Rolle's Abridgment* it is laid down (*e*), that, if meadow be sometimes arable, and some-

(*a*) Co. Litt. 283. a.; Bull. Ni. Pri. 120, 7th edit. by Bridgman; 2 Wms. Saund. 238.
 (*b*) Hetley, 85.

(*c*) Cro. Jac. 182.
 (*d*) 1 Lev. 309.
 (*e*) Vol. 2, 815, pl. 7.

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times meadow, and sometimes pasture, there the ploughing of it is not waste; and in *Bacon's Abridgment*, in a marginal note to that passage, it is said (a)—“Some say, that ploughing must be prohibited by covenant to pay so much an acre; for, that an absolute restraint from ploughing is void.” Again, it is said (b), “neither is the division of a great meadow into many parcels, by the making of ditches, waste; for the meadows may be better for it, and it is for the profit and ease of the occupiers; likewise, converting a meadow into a hop garden, is not waste, for it is employed to a greater profit, and it may be meadow again.” With respect to the trees, it is quite clear that they were cut down *bonâ fide*, and for the purpose of repairing the premises; and, although one of them turned out not to be fit for the purpose for which it was intended, yet, the fact that the plaintiff's guardian consented to have it exchanged for another, should have been admitted in evidence, in mitigation of damages; and the case of *Rennell v. Wither* is expressly in point, to shew, that it might have been received for that purpose.

Lord Chief Justice TINDAL.—This was a writ of waste brought by a reversioner against a tenant for life, in respect of waste of two different kinds or descriptions, namely, the one the ploughing up of old meadow land and converting it into arable; the other, the cutting down of two timber trees. The defendants have only pleaded the general issue, *vis.* no waste done; and at the trial, the plaintiff having proved that the meadow had been ploughed up and converted into arable, and that two oak trees growing on the premises had been felled, the Jury found a verdict for the plaintiff, with ten shillings damages for ploughing up the meadow, and five shillings each for the trees which the defendants had cut

(a) Tit. “Waste,” (C.) 1.

(b) Ibid.

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down. A motion was made in the last term to set aside this verdict, and to have a new trial, on the ground, that the learned Judge who tried the cause had misdirected the Jury, in omitting to leave it to them to say whether the meadow had not been ploughed to ameliorate the land; and it has been said, that ploughing up meadow is no waste, if it be done for the purpose of ameliorating the land; and a passage in *Rolle's Abridgment* (a) has been relied on as an authority to that effect, and which was the substantive ground of the motion. It is unnecessary for us to say whether the doctrine there laid down be law to the full extent, because, upon this record, as it is now framed, the evidence was not admissible. All the authorities agree in establishing the position, that ploughing meadow land and converting it into arable is *primâ facie* waste. I need only refer to *Coke Littleton*, 53. a.; *Dyer*, 37 a.; and *Hobart*, 234; and one of the reasons given that such an act is waste, is, because it alters the evidence of title; a reason which I think ought not to be treated lightly. In grants, land frequently passes by the specific description of meadow, pasture, arable, or the like; and if an estate, described as consisting of meadow land, be converted into arable, I am not prepared to say that the alteration of the surface might not introduce considerable difficulty in the title. It is the daily practice of this Court to amend fines and recoveries, on account of the misdescription of the quality of the land; and the ground for making such amendments is, that these documents are preserved and handed down, as certifying the title to, and identifying the lands, by reference to the purposes to which they have been applied. There is another reason why the conversion of meadow land into arable is *primâ facie* waste, *viz.* that in ancient meadow, which has been constantly watered for a great length of time, a

(a) Vol. 2, p. 814, pl. 5.

series of years, perhaps ages, must elapse, before it can be restored to its original state and value. *Prima facie*, therefore, the ploughing up the meadow in question was an injury to the plaintiff's reversionary estate. Although there may be a material difference or distinction with respect to the character of waste, for instance, if it should appear to have been done for the necessary cultivation and improvement of the land; yet, under these circumstances, the specific reason for altering the character of the land should appear, and be expressly stated on the record. In *Comyns's Digest* it is laid down (a), that, to an action for waste, the general issue is, no waste done, and that it may be pleaded in all cases where there is no waste, as if destruction happens by tempest, lightning, enemies, &c., but it is no plea where the defendant has matter of justification or excuse. Applying that doctrine to the present case, if the surface of the meadow had been destroyed by an act of Providence, as by an extraordinary flood, or had been ploughed or dug up by enemies, it would have been no act of waste by the tenant or occupier, as it was attributable to the act of God, or of a hostile force, which the law emphatically terms *vis major*. But even in such a case, it is incumbent on the tenant to endeavour to repair the injury as soon as possible. However, it is sufficient to say, that the plea of the general issue applies only to cases where the act done or complained of is not the act of the party; and if he has *prima facie* committed waste, he must admit and justify it on the record, whenever he has matter of justification to allege, for instance, if he cut down timber trees, he must plead that he cut them down for the purpose of repairing the premises. So, if he pulled down an old house, he might plead that it was in a dilapidated or decayed state, and that he had built another in its stead. The object and motive of the party

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doing the act must be apparent, and stated on the face of the record, so as to give the party complaining the opportunity of taking issue on such an allegation; and if, in this case, the defendants had pleaded that they caused the meadow to be ploughed up to ameliorate and improve the land, and proved that it had that effect, I am not prepared to say that the passage cited from *Rolle's Abridgment* might not have been in their favour. But as they have not so pleaded it, the question could not be submitted to the Jury. There was, consequently, no misdirection of the Judge in this respect. So, as to the cutting down the trees, the defendants should have pleaded that they cut them for repairs, and the plea of the general issue affords no legal answer; and, as there was no plea of justification, the evidence as to the exchange of one of the trees with the consent of the plaintiff's guardian was properly rejected. The case of *Rennell v. Wither* appears to me to be distinguishable from the present, as there the trees cut down were excepted out of the lease, and the plaintiff was bound by his covenant to furnish timber to be pointed out and assigned by his bailiff; but here, the defendants were limited to the cutting of such trees only as were fit and proper for repairs; but as it was proved that they had cut one tree which was not fit for that purpose, although it was exchanged for another with the assent of the plaintiff's guardian, it must be taken that she has sustained an injury to her reversionary interest, and it therefore appears to me that there is no ground for disturbing the verdict which she has obtained.

Mr. Justice PARK.—It must be admitted, from the current of all the authorities, that ploughing up and converting ancient meadow land into arable is, *prima facie*, waste, because it changes the course of husbandry, and materially affects the proof or evidence of the lessor's title. Here, the defendants have only pleaded the general issue of no

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waste done; but where the act done is the act of the party, any excuse he has to offer must be made the subject of a plea of justification, and put on the record. The plea of no waste committed or done can only apply, where the thing done is attributable to the act of God, or of a hostile force, or cases of a like nature. Although the case of *Barret v. Barret* established the general principle, that the law will not allow that to be waste, which is not prejudicial to the inheritance, yet there are several exceptions; and it has, nevertheless, been held, that a lessee or tenant cannot change the nature of the thing demised, although the alteration might be for the advantage or profit of the lessor. All the cases are collected in *Bacon's Abridgment* (a), and it is there said:—"That if the tenant converts arable into wood, or *à converso*, it is waste, for it not only changes the course of husbandry, but also the proof of evidence." And although in an *Anonymous* case (b) it was decided, that the converting a meadow into a hop-garden was not waste, yet Mr. Justice *Periam* said—"The conversion of a meadow into an orchard is waste, though it be to the greater profit of the occupier." As to the custom of the country, although evidence of it was admitted at the trial, the learned Judge was of opinion, that the custom was not proved, or made out in fact; but I am of opinion, that such evidence was not admissible under the general issue; and, although it has been said, that this is a harsh action, yet we cannot control the law; and it is quite clear, that the defendants were not entitled to prove that one of the trees had been exchanged for another with the consent of the plaintiff's guardian, as they had not pleaded that fact, or that they were cut down for the purpose of repairing the premises.

Mr. Justice GASELEE.—I see no reason to disturb this verdict. It is clear, from all the authorities, that

(a) Tit. "Waste" (C.)

(b) 2 Leon. 174, pl. 210.

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where the tenant or occupier has matter of justification or excuse, as where he cuts down timber trees for repairs, he must plead it specially, and cannot give it in evidence under the general issue. As to the case of *Rennell v. Wither*, I was counsel for the plaintiff, the Dean of *Winchester*, and the defendant was his tenant; and, although the ruling of the learned Judge created some surprise, yet I perfectly recollect, that, considering the situation of the parties, the plaintiff did not wish a further investigation.

Mr. Justice BOSANQUET.—The plaintiff, in his declaration, has charged the defendants with the commission of two several and distinct acts of waste: the one, ploughing up and converting meadow land to arable; the other, the cutting down timber trees. Breaking up ancient meadow is, *prima facie*, waste, and evidence as to the custom of the country ought not to have been received; and, although it was admitted, the learned Judge thought, that the custom had not been proved:—so the evidence as to the amelioration or improvement of the land, or that the meadow had been laid down according to the course of good husbandry, ought not to have been admitted, as it should have been made the subject of a special plea, and put upon the record. With respect to the trees, it is quite clear, that the defendants should have pleaded for what purpose they were felled, namely, either for repairs, or for necessary botes; and as they did not do so, I am of opinion, that evidence of the exchange of one of the trees with the consent of the plaintiff's guardian was properly rejected. If, indeed, the defendants had pleaded that fact, evidence of it might have been received in mitigation of damages; but as they did not do so, it is unnecessary to consider the case of *Rennell v. Wither*. The rule for a new trial must, therefore, be

Discharged.

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Monday,
June 6th.

RICH v. WOOLLEY and Others.

THIS was an action of trespass for breaking and entering the plaintiff's close, breaking open and breaking to pieces the gate and lock affixed to it, and seizing, taking, and driving away the plaintiff's cows and heifers. The defendants pleaded—*First*, the general issue of not guilty;—*Secondly*, that one *Francis Mayell*, on the 7th January, 1831, and for a long space of time then last past, and from thence until and at the said time when &c., held and enjoyed a certain farm, lands, and premises, with the appurtenances, situate &c., as tenant thereof to one *Mary Day*, under and by virtue of a certain demise thereof before then made by the said *Mary Day* to the said *Francis Mayell*; upon which said demise a certain yearly rent, to wit, the yearly rent or sum of 130*l.*, was reserved and made payable from the said *Francis Mayell* to the said *Mary Day*; that just before the said time when &c., to wit, on &c., a large sum of money, to wit, the sum of 110*l.* of the rent aforesaid, for part of one year of the said demise, the residue thereof having been paid and satisfied, became and was due and owing and payable from the said *Francis Mayell* to the said *Mary Day*, and from thence until and at the said time when &c., remained and continued due, in arrear, and unpaid to her, to wit, at &c.; that after the rent so became and was due and payable, and whilst the same was actually due, in arrear, and unpaid, and within thirty days next before the said time when &c., the said *Francis Mayell*, and the plaintiff, fraudulently and clandestinely conveyed away and carried off and from the said farm, lands, and premises so held and enjoyed by the said *Francis Mayell*, as

To an action of trespass for breaking and entering the plaintiff's close, breaking open the gate and lock, and driving away his cattle, the defendants pleaded, by way of justification, that rent being due from *A.* to *B.*, the plaintiff and *A.* fraudulently carried off the cattle to prevent a distress, and conveyed them to the close in which &c., and that the defendants, as bailiffs of *B.*, and by her command, entered the close, and broke the lock and seized the cattle as a distress for rent so due from *A.* to *B.*:—*Held* insufficient, as by the statute 11 Geo. 2, c. 19, s. 7, the presence of a constable is required; and as that fact was not alleged, the plea was bad, even after verdict. The defendants also pleaded, that they had distrained *A.*'s cattle for rent due

from him to *B.*; that the plaintiff wrongfully took away the cattle so distrained and then in the custody of the defendants; and because they were wrongfully detained by the plaintiff in the close in which &c. the defendants, as bailiffs of *B.*, broke open the close to retake the cattle and impound them as a distress for the rent due:—*Held*, that such plea was bad, as it did not allege that the cattle were retaken upon a fresh pursuit.

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tenant thereof to the said *Mary Day* as aforesaid, divers, to wit, six cows and six heifers, being the proper cows, heifers, goods, and chattels of the said *Francis Mayell*, to prevent the defendants, as the bailiffs and agents of the said *Mary Day*, from distraining the same for the said rent so before and at the time of the said removal actually due, in arrear, and unpaid as aforesaid; and for that purpose, conveyed the said last-mentioned cows and heifers to the said close in which &c., without leaving any other goods and chattels on the said farm, lands, and premises so held by the said *Francis Mayell* as aforesaid, whereon the defendants, as such bailiffs and agents as aforesaid, could and might distrain for such arrears of rent as aforesaid; for which reason, and because the rent still remained due, in arrear, and unpaid, and because there was no sufficient distress upon the said premises so held by the said *Francis Mayell* as aforesaid, whereon the defendants, as such bailiffs and agents as aforesaid, could distrain for such arrears of rent; and because the said last-mentioned cows and heifers which had been so fraudulently and clandestinely conveyed away and carried off by the said *Francis Mayell* and the plaintiff as aforesaid, after the said rent became and was due and in arrear, still remained and were in the said close in which &c., to which the same had been so conveyed as aforesaid, the defendants, as the bailiffs and agents of the said *Mary Day*, and by her command, afterwards, and while the said rent so remained due, in arrear, and unpaid as aforesaid, and within thirty days next after the said last-mentioned cows and heifers were and had been so fraudulently and clandestinely conveyed away and carried off as aforesaid, that is to say, at the said time when &c., broke and entered the said close in which &c., and because the said gate was then and there standing and being on the said close in which &c., and was then and there fastened with the said lock in the declaration mentioned, so that without break-

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ing open and breaking to pieces the said gate, and breaking, injuring, and destroying the said lock, the defendants, as such bailiffs and agents as aforesaid, could not enter into the said close in which &c. to distrain the said last-mentioned cows and heifers so fraudulently and clandestinely removed as aforesaid; they, the defendants, as such bailiffs and agents as aforesaid, at the said time when &c., for that purpose did necessarily and unavoidably a little break open and break to pieces the said gate, and a little break, injure, and destroy the said lock, doing no unnecessary damage, in order to seize and take the said last-mentioned cows and heifers, so being in the said close as aforesaid, as a distress for the said arrear of rent so due and owing from the said *Francis Mayell* to the said *Mary Day*, and did thereupon, at the said time when &c., and within thirty days after the said last-mentioned cows and heifers had been and were so fraudulently and clandestinely conveyed away and carried off as aforesaid, in the said close in which &c., take and seize the said last-mentioned cows and heifers, so there found and being, as a distress for the said arrears of rent, the same then remaining due, in arrear and unpaid as aforesaid.

Thirdly, that the said *Francis Mayell*, on the 7th *January*, 1831, and for a long space of time then last past, and from thence until and at the said time when &c., held and enjoyed a certain other farm, lands, and premises, with the appurtenances, situate &c., as tenant thereof to the said *Mary Day*, under and by virtue of a certain demise thereof, before then made by the said *Mary Day* to the said *Francis Mayell*, upon which demise a certain yearly rent, to wit, the rent or sum of 130*l.* was reserved and made payable from the said *Francis Mayell* to the said *Mary Day*; that just before the said time when &c., to wit, on &c., a large sum of money, to wit, the sum of 110*l.* of the rent aforesaid, was due and owing and payable from the said *Francis Mayell* to the said *Mary Day*, and from

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thence until and at the said time when &c., remained and continued due, in arrear, and unpaid; that just before the said time when &c., that is to say, after the said last-mentioned rent became and was due and payable, and whilst the same was actually due, in arrear, and unpaid, the defendants, as bailiffs and agents of the said *Mary Day*, and by her command, to wit, on &c., at &c., distrained divers cattle, goods, and chattels of the said *Francis Mayell*, to wit, six other cows, and six other heifers, then being in and upon the said last-mentioned farm, lands, and premises, for the said last-mentioned rent so due, in arrear, and unpaid as aforesaid, to the said *Mary Day*; that the plaintiff, before the said time when &c., did wrongfully seize, take, and carry away the said last-mentioned cows and heifers so distrained as aforesaid, and then in the custody of the defendants as such bailiffs and agents, and the same did carry off from the said last-mentioned farm, lands, and premises; and before the said time when &c., did wrongfully convey the said last-mentioned cows and heifers to the said close in which &c.; and because the said last-mentioned cows and heifers, at the said time when &c., were wrongfully put and detained by the plaintiff, and then were in the said close in which &c., the said rent being unpaid and unsatisfied, the defendants, as bailiffs and agents of the said *Mary Day*, and by her command, at the said time when &c., in order to retake the said cows and heifers, and to impound them as a distress for the said rent so due, in arrear, and unpaid as aforesaid, broke and entered the said close in which &c., and because the said gate was then and there standing and being on the said close in which &c., and was then and there fastened with the said lock in the said declaration mentioned, so that without breaking open and breaking to pieces the said gate, and breaking, injuring, and destroying the said lock, the defendants, as such bailiffs and agents as aforesaid, could not enter into the said close in

which &c. to retake the said cows and heifers so wrongfully carried off as last aforesaid, the defendants, as such bailiffs and agents as aforesaid, at the said time when, &c., and for that purpose, did necessarily and unavoidably a little break open and break to pieces the said gate, and a little break, injure, and destroy the said lock, and take the said cows and heifers so being in the said close as aforesaid, and drive them out of the said close in which, &c.

The plaintiff added a *similiter* to the plea of not guilty; and replied to the second, that the said *Francis Mayell* and the plaintiff did not fraudulently or clandestinely convey away, or carry off or from the said farm, lands, and premises so held and enjoyed by the said *Francis Mayell* as such tenant thereof to the said *Mary Day* as aforesaid, the said cows or heifers in the said second plea mentioned, or any or either of them, to prevent the defendants, as the bailiffs and agents of the said *Mary Day*, from distraining the same for the said rent so due; in arrear, and unpaid as aforesaid.

To the third and last plea, the plaintiff replied, that he did not, before the said time when, &c., wrongfully seize, take, or convey the said cows and heifers in the said last plea mentioned, or any of them, in manner and form as the defendants had above in their said last-mentioned plea in that behalf alleged.

On those replications issues were joined by the defendants.

At the trial, before Mr. Justice *Taunton*, at the last Assizes at *Salisbury*, the Jury found a verdict for the plaintiff on the plea of not guilty, with one farthing damages, for breaking open the lock of the gate;—and for the defendants on the issues on the two pleas of justification.

Mr. Serjeant *Wilde*, in the last term, obtained a rule

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nisi that a verdict might be entered for the plaintiff on those two issues, *non obstante veredicto*, on the ground, that neither of the special pleas disclosed a sufficient or legal cause for the removal of the cattle from the plaintiff's close. The first of these pleas is founded on the statute 11 *Geo. 2*, c. 19; by the 7th section of which (a), landlords and lessors are empowered to break open in the day time, *with the assistance of a peace officer*, any place where goods fraudulently removed are deposited, and even a dwelling-house, oath being first made before some Justice of the Peace, of a reasonable ground to suspect such goods to be therein; and the defendants neither alleged nor proved that they called a constable or other peace officer to their aid or assistance when they broke open the plaintiff's gate. A new authority was given by that statute, which was passed for the benefit of landlords; and when a party acts under it, he should follow the conditions imposed by it, with strictness, and to the letter; and the calling in a constable or peace officer was thought by the Legislature to be necessary, with a view to the preservation of the public peace. The second special plea discloses no legal defence for breaking open the gate and taking the cattle, as it was incumbent on the defendants to have alleged that the cattle were retaken upon fresh pursuit.

Mr. Serjeant *Bompas* now shewed cause.—Both the special pleas are sufficient, and afford a legal answer to the plaintiff's complaint, for breaking open the gate of his close, and taking his cows and heifers. Although, as to the first, it has been objected, that it was incumbent on the defendants to allege that they called in a constable or peace officer to their aid when they broke open the gate, yet his presence was not necessary: at all events, it must be assumed, after verdict, that he accompanied the de-

(a) See this section, *post*, p. 673.

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endants, and the Jury found that the cattle had been removed by the plaintiff clandestinely, and with a view to defeat the distress. That part of the 7th section of the 11 Geo. 2, c. 19, which requires the assistance of a constable or peace officer, is in a parenthesis, and applies only to cases where *goods are suspected to be concealed*; and in case of a dwelling-house, it is necessary for the party first to make oath before a magistrate, that he has reasonable ground to suspect that the goods are in the house. Here, however, the cattle were in the open field, and when the defendants saw them there, they had a right to retake them without sending for a constable. The statute, being a remedial act, must receive a liberal construction, and the words *suspected to be concealed* cannot be rejected; and in such a case only, can the presence of a constable be required; and here there was no concealment; the defendants, therefore, are entitled to judgment on the second plea. The third or last plea is also sufficient; for the defendants alleged that they had distrained the cows for rent, and that the plaintiff wrongfully seized and took them away, they having been so distrained, and then being in the custody of the defendants; and they then justified the retaking them for the purpose of impounding them under and by virtue of the distress. It is quite clear, that if a person rescue cattle or goods, or take them out of the custody of a party who is by law entitled to them, such person is guilty of a misdemeanor; and here, the defendants have in fact averred, that the plaintiff had wrongfully rescued the cattle, upon which they retook them, as they lawfully might, to impound them as a distress for the rent due, and for which they had been previously distrained. In Lord Coke's *First Institute* (a) it is laid down, "that rescous is a taking away and setting at liberty against law a distress taken, or a person arrested by the process or course of law; and that when a

(a) Page 160. b.

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man hath taken a distress, and the cattle distrained, as he is driving of them to the pound, go into the house of the owner, if he that took the distress demand them of the owner, and he deliver them not, this is a rescous in law." Here, the plaintiff had no right to remove the cattle to his own field, much less to lock the gate; and the defendants were justified in breaking it open. In *Genner v. Sparks* (a) the Court held, that a bailiff, after an arrest, may break open the doors of a house to seize his prisoner: and, 1 *Hale*, 459; *Foster*, 319; *Hawkins's Pleas of the Crown*, Book 2, c. 14, s. 9; are referred to as authorities in support of that position; and, in *Francombe v. Pinche* (b), it was held, that a party might justify the breaking open a house to recover goods which had been unlawfully rescued; and here, the defendants merely broke open the gate of the plaintiff's field, which they were warranted in doing, as the cattle had been fraudulently removed there by him, and with a view to defeat the distress.

Mr. Serjeant *Stephen*, in support of the rule, was stopped by the Court.

Lord Chief Justice TINDAL.—I am of opinion, that neither the second nor third pleas on this record set out sufficient facts in law to justify the trespass alleged in the declaration, neither do they afford a substantial or legal excuse to the plaintiff's complaint; and, therefore, that although the defendants have obtained a verdict on those pleas, the plaintiff is, nevertheless, entitled to have a verdict entered for him. He, in his declaration, complains of a trespass committed by the defendants by breaking and destroying the lock of the gate. The first special plea of justification in substance is, that rent being due and in arrear from one *Francis Mayell* to *Mary Day*, he, and

(a) 6 Mod. 173.

(b) 1 Esp. Ni. Pri. Dig. 4th edit. 396.

the plaintiff, within thirty days next before the time when, &c., fraudulently and clandestinely conveyed away and carried off cattle from *Mayell's* premises, to prevent the defendants, as the bailiffs of *Mary Day*, from distraining them, and conveyed them to the close in which, &c., for which reason, and because the rent still remained in arrear and unpaid, the defendants, as such bailiffs of *Mary Day*, and by her command, within thirty days next after the cattle had been so fraudulently conveyed away, broke and entered the close in which, &c., and broke open the gate, and broke the lock, in order to seize and take, and did seize and take, the said cattle, as a distress for the arrears of rent so due and unpaid. This plea is evidently framed upon, and intended to embrace the provisions contained in the statute 11 *Geo. 2*, c. 19; and it has been objected, that all the conditions imposed by that statute have not been observed by the defendants; neither have they alleged a material fact required by that act, for that whenever the lock of a gate of a close or the door of a house is broken open, the party breaking it must call in a constable or peace officer to his aid; and, therefore, that the second plea is bad, as the defendants have not averred that they called a constable to their assistance, or that he was present when the gate was broken open. The authority to take cattle or goods fraudulently removed for the purpose of avoiding a distress, was first given to the landlord by the statute 11 *Geo. 2*, c. 19, and, being a new authority, it is the duty of a landlord to comply with all the requisitions of the act, and pursue the course there pointed out, with strictness and accuracy. But it has been urged, on the part of the defendants, that there is no occasion to call for the aid of a constable, neither is his presence necessary, where there has been no concealment, and the entry is made on an open close, which is distinguishable from a building or dwelling-house where goods are suspected to be concealed; but I think, that, on the fair construction of the

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statute, the presence of a constable is required upon breaking open any place locked up; and, in case of breaking into a dwelling-house, the additional precaution of a previous application to a magistrate, on the oath of the party, that he has reasonable ground to suspect that the goods so removed are in the house, is required. It is necessary, in the first place, to look at the first section of the statute, which, after reciting that the several laws heretofore made for the better security of rents, and to prevent frauds committed by tenants, have not proved sufficient to obtain the good ends and purposes designed thereby; but rather the fraudulent practices of tenants, and the mischief intended by the said acts to be prevented, have of late years increased, to the great loss and damage of their lessors or landlords, enacts, "that in case any tenant, lessee for life or lives, term of years, at will, sufferance, or otherwise, of any messuages, lands, tenements, or hereditaments, upon the demise or holding whereof any rent is reserved, due, or made payable, shall fraudulently or clandestinely convey away, or carry off or from such premises, his goods or chattels, to prevent the landlord or lessor from distraining the same for arrears of rent so reserved, due, or made payable;—it shall be lawful for every landlord or lessor, or any person by him for that purpose lawfully empowered, within the space of thirty days next ensuing such conveying away or carrying off such goods or chattels as aforesaid, to take and seize such goods and chattels, wherever the same shall be found, as a distress for the said arrears of rent; and the same to sell, or otherwise dispose of, in such manner as if the said goods and chattels had actually been distrained by such lessor or landlord, in and upon such premises, for such arrears of rent." Now, this section gives the landlord the same authority over the premises to which goods shall have been clandestinely removed, as if they had remained on the premises demised; and, by the common law, the landlord could have no right to break open a lock or

break a fastening, or even to take a padlock off a barn door, for the purpose of seizing corn therein as a distress. But the 7th section gives a landlord a more extended remedy, where there has been a fraudulent removal of goods, which are locked up or secured on the premises to which they have been removed, for it enacts, that "where any goods or chattels, fraudulently or clandestinely conveyed or carried away by any tenant, lessee, his servant, agent, or other person aiding or assisting therein, shall be put, placed, or kept in any house, barn, stable, outhouse, yard, *close*, or place *locked up*, fastened, or otherwise secured, so as to prevent such goods or chattels from being taken and seized as a distress for arrears of rent; it shall be lawful for the landlord, lessor, his steward, bailiff, receiver, or other person empowered to take and seize, as a distress for rent, such goods and chattels (first calling to his assistance the constable, headborough, borsholder, or other peace officer of the hundred, borough, parish, district, or place, where the same shall be suspected to be concealed, who are thereby required to aid and assist therein; and, in case of a dwelling-house, oath being also first made before some Justice of the Peace, of a reasonable ground to suspect that such goods or chattels are therein), in the day time, to break open and enter into such house, barn, stable, outhouse, yard, *close*, and place, and to take and seize such goods and chattels for the arrears of rent, as he might have done by virtue of that or any former act, if such goods and chattels had been put in any open field or place." The Legislature, contemplating the infirmity of the common law, which would not allow premises which were locked or fastened to be broken into by a landlord, for the purpose of distraining for rent, required him to call a constable or peace officer to his assistance, in every case where it might be necessary to break open and enter a house or *close*; and this was for the purpose of preventing acts of assault, or a breach of the peace, which might otherwise follow, by a party entering on the lands or pre-

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mises of a stranger; and, if the goods be removed, or suspected to be concealed in a dwelling-house, it is necessary for the party to make previous application to a magistrate on oath, that he suspects that the goods are in such house; then the landlord has the remedy of following the goods, and seizing them for the rent due, if he exercise a proper degree of caution, and fulfils the conditions imposed on him by the statute, but it is incumbent on him to follow them strictly; and, if he neglect to do so, his proceeding is without authority.

The second special plea of justification is, that the defendants, as bailiffs of *Mary Day*, and by her command, distrained cattle of *Mayell*, being upon his premises, for rent due from him to her: that the plaintiff, before the said time when, &c., wrongfully seized, took, and carried away the cattle so distrained, and then in the custody of the defendants as such bailiffs, and wrongfully conveyed them to the close in which, &c.; and, because they were wrongfully detained by the plaintiff in the said close, in which, &c., and the said rent being unpaid, the defendants, as bailiffs of *Mary Day*, and by her command, in order to retake the cattle and impound them as a distress for the rent so due, broke and entered the close in which, &c.; and, because the gate standing on the close was fastened with the lock, the defendants necessarily and unavoidably broke open the gate, and injured the lock, and took and drove the cattle out of the close. This plea, in substance and effect, alleges a retaking of cattle rescued, and which had been previously distrained for rent due from *Mayell* to his landlady, *Mary Day*. No cause is alleged or shewn of any right or authority for the defendants to go to the premises of the plaintiff, who is stated to have rescued the cattle, or to break open the gate of his close, and take them from thence. The first, and most material omission is, that the defendants have not stated or alleged that the cattle were retaken upon fresh pursuit, or from the per-

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sonal custody of the defendants. Compatible with the facts stated in this plea, the retaking the cattle might have been at a period far distant from the time of the distress. The common law gave the party injured a writ of *rescous*, by which he was entitled to single damages only; but, this being found to be insufficient, the statute 2 *Wm. & Mary*, sess. 1, c. 5, provided an additional remedy; and the fourth section enacts, that, upon any rescue of goods or chattels distrained for rent, the person grieved thereby shall, in a special action on the case for the wrong thereby sustained, recover treble damages and costs against the offender, or against the owner of the goods distrained, in case the same be afterwards found to have come to his use or possession; and the statute 11 *Geo. 2*, c. 19, enlarges the powers of distress in the case of a fraudulent removal of goods, and gives the landlord, or distrainor, a new and distinct remedy. But there is another mode by which the party injured might have his remedy, namely, by re-capture or reprisal, which Mr. Justice *Blackstone* thus defines (a), "This happens, when any one hath deprived another of his property in goods or chattels personal, in which case the owner of the goods may lawfully claim and retake them wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace. If, therefore, he can so contrive it as to gain possession of his property again, without force or terror, the law favours and will justify his proceeding. But, as the public peace is a superior consideration to any one man's private property; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease, the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided, that this natural right of recapture shall never be exerted, where such exertion must occasion strife

(a) 3 Bl. Com. 4.

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and bodily contention, or endanger the peace of society. If, for instance, my horse is taken away, and I find him in a common, a fair, or public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable, or entering on the grounds of a third person, to take him, except he be feloniously stolen; but must have recourse to an action at law." If, then, the common law will not allow a party to resort to force, for the purpose of retaking his own goods, *a fortiori*, a larger or greater power should not be afforded, where the goods distrained are found in the possession or custody of a third person; at all events, unless they are retaken upon fresh pursuit. In *Genner v. Sparks*, a bailiff having a legal warrant against a person, went to arrest him, upon which he retreated into his house, and the Court agreed, that if the bailiff had but touched the party even with the end of his finger, it would have been an arrest, and he might have broken the house afterwards to seize upon him. There, too, the bailiff, as a public officer, was protected by the law; which is a very different case from a private unauthorized individual, acting in vindication of his own right. In *Francombe v. Pinche*, there was a continuance of possession from the time of the seizure; whilst here, nothing appears on the face of the plea, to couple or connect the retaking of the cattle with the previous distress. I much regret that the plaintiff is entitled to retain his verdict, as the merits of the case are in favour of the defendants, the Jury having found that the plaintiff removed the cattle clandestinely, and with a view to defeat the distress.

Mr. Justice PARK.—After the luminous exposition by my Lord Chief Justice, as to the meaning and construction to be put upon the statute 11 Geo. 2, c. 19, it would be idle for me further to take up the time of the Court than to express my entire concurrence. This case is altogether distinguishable from those to which we have been

referred, as the question depends entirely on the language of the seventh section of the statute.

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Mr. Justice GASELER.—I am of the same opinion. The first section of the statute only empowers a landlord, or person employed by him, to seize goods fraudulently or clandestinely removed, in the same manner as if they had remained on the premises of the tenant, in which case it is quite clear that the defendants would not have been justified in breaking open a lock of a door or gate; and the seventh section, which gives the authority, expressly requires the presence of a constable or other peace officer. With respect to the insufficiency of the second plea, I need only express my entire concurrence with what has been said by my Lord Chief Justice.

Mr. Justice BOSANQUET.—I am also of opinion, that both these pleas are bad in law. Where goods are fraudulently removed, to prevent the landlord from distraining for rent, he is only empowered, by the first section of the statute, to take and dispose of them in such manner as if they had been distrained by him on the premises of his tenant; and, if a party resorts to the further remedy given by the seventh section, under which he may justify the breaking open of a door or gate, he must pursue the course pointed out by that section, and, in order to avail himself of it, he must be attended by a peace officer; and if goods be suspected to be concealed in a dwelling-house, he must, in the first place, make oath before a magistrate, that he has reasonable grounds for such suspicion. With respect to the last special plea, although the defendants have alleged that the cattle distrained were in their custody when they were taken away by the plaintiff, yet it does not follow that the defendants had a right to enter on his premises and retake them at any distance of time after they had been so removed. In *Francombe v. Pinche*, there was a

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continuance of possession from the time of the seizure, and which constituted one and the same transaction. The rule, therefore, for entering a verdict for the plaintiff on the two special pleas, must be made

Absolute.

Monday,
June 6th.

BROUGH v. ADCOCK.

After a commission of bankruptcy was sued out against the plaintiff, on the 15th of *January* last, under which he was duly declared a bankrupt. On the 9th of *February* following, the defendant signed judgment as in case of a nonsuit, and costs were taxed on the same day; and, on the 20th of *April*, the plaintiff obtained his certificate, which was afterwards duly allowed. The plaintiff having been taken in execution for the costs under a writ of *capias ad satisfaciendum*, and paid the amount to the Sheriff of *Lincoln*—

A COMMISSION of bankruptcy was sued out against the plaintiff, on the 15th of *January* last, under which he was duly declared a bankrupt. On the 9th of *February* following, the defendant signed judgment as in case of a nonsuit, and costs were taxed on the same day; and, on the 20th of *April*, the plaintiff obtained his certificate, which was afterwards duly allowed. The plaintiff having been taken in execution for the costs under a writ of *capias ad satisfaciendum*, and paid the amount to the Sheriff of *Lincoln*—

Mr. Serjeant *Taddy*, on a former day in this term, obtained a rule, calling upon the defendant to shew cause why the sum so levied and paid to the Sheriff should not be returned to the plaintiff, on the ground, that he was discharged by his certificate from payment of the costs; for that, although the judgment was not signed until after the commission was issued, yet, in law, it related back to the first day of the term, namely, the 11th of *January*, and the costs might therefore have been proved under the commission; and, by the statute 6 *Geo. 4*, c. 16, s. 121, it is enacted, "that a bankrupt, who shall have duly surrendered, and in all things conformed himself to the laws in force concerning bankrupts at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and

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BROGAN
v.
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demands hereby made provable under the commission, in case he shall obtain a certificate of such conformity, so signed and allowed, and subject to such provisions as thereafter directed;" and here the plaintiff's certificate was duly allowed.

Mr. Serjeant *Wilde* was now about to shew cause, when—

Lord Chief Justice TINDAL referred to the case of *Hansell v. Thorogood* (a) as being precisely in point. There, a cause having been referred, at *Nisi Prius*, to an arbitrator, and he found that a certain sum was due from the plaintiff to the defendant, and directed it to be paid to the latter, and between the time of making the order of reference and taxing costs, and signing judgment of nonsuit, the plaintiff became bankrupt, it was held, that the amount of the taxed costs did not constitute a debt provable under the commission, and that the bankrupt was not discharged as to that debt by his certificate; and Lord Tenterden said—"the costs of the cause did not constitute any debt until judgment was signed, for there is no distinction in this respect, between a case where a defendant obtains a verdict, and one where the plaintiff is nonsuited. The verdict or nonsuit only entitles a defendant to tax his costs, but no debt arises, and no action can be maintained for them until judgment is signed. The case of *Walker v. Barnes* (b) is a decisive authority to shew, that the amount of these costs could not be proved as a debt under the plaintiff's commission, and, if that be so, then he is liable to pay them." There, the plaintiff became bankrupt after the nonsuit, but before judgment was signed. Here, however, the commission was sued out

(a) 7 Barn. & Cress. 705.

(b) 5 Taunt. 778.

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against the plaintiff on the 15th of *January*, and the judgment of nonsuit was not signed until the 9th of *February* following. This rule, therefore, must be

Discharged.

Wednesday,
 June 8th.

NELSON v. CHERRELL and Another.

A second commission of bankruptcy having been issued against a trader, who had not paid any dividend under the first, or obtained his certificate:—*Held*, that the second commission is null and void.

THIS was an action of trespass for breaking and entering the plaintiff's house, and taking his goods. The defendants pleaded, that, on the 27th of *February*, 1830, one *Henry Lloyd* became bankrupt; that a commission was issued against him, on the petition of *John Green* and *John Green* the younger, and that *Lloyd* was duly adjudged a bankrupt, that the defendants were chosen and appointed his assignees; that the commission was still in full force, and that the said *Henry Lloyd* became lawfully possessed of the goods in the declaration mentioned, and which, by the bankruptcy, were lawfully vested in the defendants, as his assignees, and were in the said dwelling-house in which, &c., at the said time when, &c.; and that the defendants were entitled, as the assignees of *Lloyd*, to take away and have possession of the said goods, &c., and that, thereupon, they peaceably entered the house, and seized and took the goods.

The plaintiff, in his replication, after admitting that the commission was sued out against *Lloyd*, as alleged by the defendants in their plea, averred, that a prior commission had been sued out against *Lloyd*, under which, one *Richard Cuttill* had been chosen assignee, and, that no certificate had been obtained by the said *Henry Lloyd*. under that commission.

The defendants, in their rejoinder, did not deny

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that the first commission had been sued out against *Lloyd*; but alleged, that after it was issued, and before the second commission was sued out, the said *Henry Lloyd* had in his possession, order, and disposition, the said goods and chattels in the declaration mentioned, by the consent and permission of *Cuttill*; and that the said goods passed by the assignment to the defendants, under the second commission.

To this rejoinder the plaintiff demurred, and the defendants joined in demurrer.

The cause now came on for argument, when Mr. Serjeant *Russell*, having referred to the case of *Fowler v. Coster* (a), as being an authority precisely in point, where it was held, that a third commission issued against a trader who had not paid any dividend to his creditors under a first and second commission, was a nullity; and Lord *Tenterden*, in delivering the judgment of the Court, referred to the case of *Till v. Wilson* (b), where it was decided, that a second commission was absolutely void at law, where a bankrupt had not obtained his certificate under the first.

The Court called on Mr. Serjeant *E. Lawes* to distinguish the present from those cases.

The learned Serjeant submitted, that there the application was made by the bankrupt himself, and by which he sought to be discharged out of custody, whilst here the plaintiff was a perfect stranger to both the commissions; and, although the bankrupt had not obtained his certificate under the first commission, it does not follow that the second is void.

Lord Chief Justice TINDAL.—How can the Court hold

(a) 10 Barn. & Cress. 427.

(b) 7 Barn. & Cress. 684; S. C. 1 Man. & Ryl. 580.

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the second commission to be void as to one person, and valid as to another? The cases to which we have been referred, are decisive to shew, that, where a bankrupt has not obtained his certificate under the first commission, a second cannot be supported; and we fully approve of that decision.

Judgment for the plaintiff.

Per Curiam.

Thursday,
June 9th.

WILCE, Demandant; WILCE, Tenant.

A testator commenced his will as follows—

“As touching such worldly property where-with it hath pleased God to bless me in this world, I give, devise, and dispose of the same in the following manner and form;” then, after several dispositions both of land and goods, there was the following residuary clause, “all the rest of my worldly goods, bonds, notes, book-debts, and ready money, and every thing else I do possessed of, I give to my son George.”—Held, that lands of the testator, not specifically devised by the will, passed to his son George, and that he took an estate in fee.

THIS was a writ of entry, brought by the demandant, to recover from the tenant certain land, called *Carclase*, situate in the parish of *St. Kew*, in the county of *Cornwall*. The demandant alleged, that one *George Wilce* died seised in fee, within thirty years next before the issuing the original writ; that, on his death, the right descended to one *John Soper Wilce*, the eldest son and heir of *George Wilce*, and from him, on his death, to the demandant, the son and heir of *John Soper Wilce*; and into which land the tenant entered by abatement, after the death of *George Wilce*, and in the life-time of *John Soper Wilce*.

To this the tenant pleaded, *first*, a devise to him of the land, in fee simple, by the said *George Wilce*; and, *secondly*, a devise to him, the tenant, of the land for his life, by the said *George Wilce*. The demandant, in his replication, denied both these devises, upon which issue was joined.

At the trial, before Mr. Justice *Taunton*, at the last Assizes for the county of *Cornwall*, a verdict was taken

for the demandant, subject to the opinion of the Court on the following case—

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George Wilce being seised in fee, and in possession of certain real property, made his will, dated the 12th of *June*, 1804, duly executed and attested to pass real estates, by which he disposed of his property as follows:—*namely*, “As touching such worldly property wherewith it hath pleased God to bless me in this world, I give, devise, and dispose of the same in the following manner and form:—*first*, I give to my wife 20*l.* a-year, payable out of my estate called *Carclase*, so long as she remains a widow:—*second*, I give to my daughter, *Ann Treffry*, 20*l.* a-year, payable out of *Carclase* aforesaid, as long as she lives;—*third*, I give to my son, *John*, all my estate in *Crewkerne*, in the county of *Somerset*, and a l thereunto belonging; also, a house and garden in *Chapple Amble*; also a house and garden and smith’s shop, in *Amble* aforesaid, now in the possession of *H. Pollard*;—*fourth*, I give one half endea*l* of my estate, called *Trevaran*, to my daughter, *Catherine Lean*, together with the sum of 10*l.*;—*fifth*, I give one half endea*l* of my estate, called *Trevaran*, to my son *Thomas*, together with a house and garden in *Chapple Amble*;—*sixth*, I give one half endea*l* of my estate, called *Tregare*, to my son *Henry*, together with a field and house in *Chapple Amble*, in consideration of his paying my grandchildren 5*l.* each;—*seventh*, I give one half endea*l* of my estate, *Tregare*, to my daughter, *Mary Ann*, upon condition of her paying 10*l.* each to my brothers *Thomas* and *John*, and my sister, *Elizabeth People*; and to my brother *William*, 6*l.* yearly, out of *Tregare*;—*eighth*, I give to my son *George* (the tenant) my estate in *St. Kew*, called *North Barton*, upon paying my daughter, *Ann Treffry*, and my daughter, *Catherine Lean*, 10*l.* a-year out of my said estate called *North Barton*, and also 10*l.* a-year each to my sons, *Thomas* and *Henry*, as long as they live.”—Then, after a legacy of 5*l.* each to *Robert*

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 }
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and *Elizabeth Rawden*, the testator proceeded as follows: "If any or either of my before-mentioned children shall happen to die before they shall arrive at the age of twenty-one years, all houses, gardens, premises, or parts of premises given in this my will, to either of them so dying, shall become the property of my children that shall be then living, share and share alike. *All the rest of my worldly goods, bills, bonds, notes, book debts, and ready money, and every thing else I die possessed of*, I give to my son *George*, whom I make my whole and sole executor. And I do hereby nominate and appoint *John Tickell*, of &c., and *Nicholas Thomas*, of &c., my trustees, in trust, to pay all the legacies before mentioned, and for fulfilling all this my last will and testament."

The testator died in *July*, 1804, without having altered or revoked his will. At the time of making his will, and at his death, he was, amongst other real property, seised in fee, and in possession of the estate of *Carclase*, in the will mentioned, which was the subject of this suit, and was not included in any of the lands or tenements specifically devised in and by the said will. The demandant was the son and heir-at-law of the said *John Soper Wilce*, who was the eldest son and heir-at-law of the testator, and who is mentioned in the will as his son *John*. The tenant was a younger son of the deviser, and the person named in the will as executor and legatee.

The question for the opinion of the Court was—Whether the above-mentioned estate of *Carclase* passed to the tenant, either in fee simple, or for life, under the above will. Should the Court be of opinion, that it did so pass, then the verdict was to be entered for the tenant; but, if of a contrary opinion, then the verdict was to be entered for the demandant.

The case now came on for argument.

Mr. Serjeant *Russell*, for the demandant.—No interest

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in *Carclase* estate passed to the tenant under the will, but the fee is vested in the demandant as the testator's heir-at-law. Although it may be said that the preamble shews a manifest intention by the testator to dispose of the whole of his property, yet, in *Doe d. Spearing v. Buckner*, Lord *Kenyon* said (a)—“ It is our duty to give effect to the intention of the testator, if that can be discovered; but if we cannot find out that intent, the title of the heir-at-law must prevail. I do not see any words in the will to disinherit the heir-at-law. The testator set out in the beginning of his will as if he had intended to dispose of all his property. But though those general words would have shewn his intention if there had been subsequent words in the will to carry that intent into execution, as was held by Lord *Talbot* in *Ibbetson v. Beckwith* (b), it has been held, in a variety of cases, that alone they are not sufficient to dispose of a fee. And by adverting to the residuary clause, there are no words to pass the estate in question. The testator only meant that that should extend to his personal estate.” So, here, the residuary clause extends only to the testator's personal estate, and there are no words to shew that he meant to convey any part of his real estate to his son *George*. In *Roe d. Helling v. Yeud*, Sir *James Mansfield* said (c)—“ In cases between the heir and the devisee, the question is not, whether the heir can prove that the testator did not intend to pass real property, but whether the devisee can prove that he did? The proof lies on the devisee.” So, here, the tenant must satisfy the Court that the estate in question passed to him under the residuary clause of the will; and the intention of the testator that it should so pass, must be clearly and satisfactorily shewn. In *Doe d. Hick v. Dring* (d), where the question was, whether a testator's reversionary interest

(a) 6 Term Rep. 610.

(c) 2 New Rep. 220.

(b) Cas. temp. Talb. 157.

(d) 2 Mau. & Selw. 448.

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in a real estate passed under the word "*effects*," Mr. Justice *Le Blanc* said (a)—"The question is, what is the meaning of the word *effects*? If the Court can see that the testator meant by it to pass his real estate, then the judgment must be for the plaintiff (the devisee); but if we are not perfectly satisfied upon that point, then the judgment must pass for the heir (the defendant);" and Mr. Justice *Bayley* said—"In order to entitle the plaintiff, we must be satisfied that it was the intention of the testator to pass his real property. If that is left in doubt on the face of the will, the necessary consequence is, that we ought not to change the possession, and take it from the heir, and give it to the devisee;" and Mr. Justice *Dampier* said—"The heir-at-law has an interest, to be taken away from him only by clear expressions in favour of the devisee." That is the true principle; and, in *Doe d. Bunny v. Rout* (b), where a testator bequeathed to his sister all his stock in trade, household goods, wearing apparel, moneys, securities for money, and every other thing his property, of what nature or kind soever, for her own use and benefit, and appointed her his executrix, it was held, that the personal property only passed under the will; and Lord Chief Justice *Gibbs*, in delivering the judgment of the Court, referred to all the cases on this subject, and particularly to that of *Timewell v. Perkins* (c), where the testator devised all his freehold lands and hop grounds, with the messuages and tenements in the occupation of L., and all other the rest, residue, and remainder of his estate consisting in ready money, plate, &c., or in any other thing whatsoever or wheresoever, to A. H., and her assigns for ever; and the question was, whether the residue passed to A. H. or not: Mr. Justice *Fortescue* said, that the words 'whatsoever and wheresoever' must be confined to the things antecedent, viz.

(a) 2 Mau. & Selw. 456.

(b) 2 Marsh. 397; S. C. 7 Taunt. 79.

(c) 2 Atk. 102.

the hop grounds and leaseholds; that is, he considered that as those words were preceded by an enumeration of the personal estate, they must be confined to the same description of property;—and here, in the residuary clause, the testator's personal property only is enumerated, and his real estates are expressly devised in the body of the will. In *Doe d. Hurrell v. Hurrell (a)*, a bequest of all the rest and residue of the testator's estate and effects whatsoever and wheresoever, to trustees, was held not to pass real estate. Here, throughout the whole of the will, where the testator speaks of the realty generally, he uses the word *estate*, and where he intends to designate it particularly, he employs apt words, as houses, gardens, &c., but none of those words are to be found in the residuary clause, which is limited to the testator's worldly goods and chattels; neither are there any words of limitation in that clause; and, as he had before given an estate to his son *George*, he merely meant that he should take the residue of his personal property, which he had not previously disposed of by his will.

[Mr. Justice *Bosanquet*.—In *Stuart v. The Marquis of Bute (b)*, where the testator, having devised certain freehold lands, bequeathed waggon ways, and all implements, utensils, and things, which, at the time of his death, should be used for the working of certain collieries, Lord *Redesdale* said (c), “it was settled on decided cases, that the word *things* must be understood as applying to things *ejusdem generis* with particulars previously specified.”]

Mr. Serjeant *Merewether*, *contra*.—The property in the testator's estate, called *Carclase*, passed to the tenant by the words contained in the residuary clause of the will. That clause must be looked at and taken in conjunction with the preamble or introductory clause; and, although each by itself might not have been sufficient to pass the

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(a) 5 Barn. & Ald. 18. (b) 1 Dow's Parl. Cas. 73. (c) Id. 84.

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estate in question to the tenant as residuary legatee and executor of the testator, yet, if both are taken together, it is clear that the testator intended that the estate should go to him.

The cases which have been referred to, and relied on for the demandant, are distinguishable from the present. In *Doe d. Spearing v. Buckner*, and *Roe d. Helling v. Yeud*, there was no introductory clause in the will indicating an intention of the testator to dispose of his whole property; and, in the latter case, there was not a single provision which had the least relation to real estate. So, in *Timewell v. Perkins*, the words "whatsoever and wheresoever" were preceded by words enumerating and disposing of personal property only; and they were properly held to be confined to the same description of property. In *Doe d. Hurrell v. Hurrell*, the testator bequeathed the rest and residue of his estate to trustees for certain specific purposes, upon which alone the judgment of the Court proceeded; and, Lord Chief Justice *Abbott* said (*a*), that it was not necessary that the trustees should take the real estate, as it was not suitable to the purposes of the trust." Here, however, the residuary clause is immediately preceded by devises of the testator's real estates; and the words, "all the rest of my worldly goods," which follow, coupled with those of the testator's worldly property in the preamble or introductory part of the will, indicate a clear intent that he meant to dispose of the whole of his property; and that if either of his estates was not specifically enumerated or described in the body of the will, it was to go to the tenant as his residuary legatee, whom he appointed his sole executor. But the residuary clause of itself contains words sufficient to pass the estate in question to the tenant; for the testator, besides bequeathing to him all his worldly goods, securities,

(*a*) 5 Barn. & Ald. 21.

debts, and money, gave him "every thing else he died possessed of," which is a distinct and separate bequest, and sufficient to pass the interest in the estate in question to the testator's son, *George*, although he had given him another estate in a previous part of the will. In *Beachcroft v. Beachcroft* (a), a testator began his will by disposing of all his worldly estate; and, after directing all his debts to be paid, bequeathed to his wife a moiety of what should be left after the payment of such debts; and it was held, that a fee in a moiety of the surplus of the real estate passed to her; and the Lord Chancellor said—"My worldly estate comprises as well real as personal: his worldly estate comprises all he had in the world." The case of *Ibbotson v. Beckwith* (b), is an authority to shew, that introductory words manifesting an intention to devise all the testator's estate are of considerable weight in favour of such intent. There, a testator began his will with these words—"as touching my worldly estate, wherewith it has pleased God to bless me, I give, devise, and dispose of the same in the following manner." He then gave his mother all his estate at *N.*, with all his goods and chattels, for her life, and to his nephew, *T. D.*, after her death; and Lord *Talbot* decreed, that the nephew took an estate in fee, for that the intent of the testator plainly appeared to be, to pass the inheritance. In *Hogan d. Wallis v. Jackson* (c), the testator began his will as follows—"and as to my worldly substance, I give and bequeath to my mother my house and lands, &c., during her life;" and, after giving several legacies and annuities, he devised to his mother all the remainder and residue of all his effects, both real and personal, which he should die possessed of; and it was held, that, by the residuary clause, she took a fee in all the testator's fee-simple estates, and the whole of his interest in the rest of his real property, subject to the charges thereon; and

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(a) 2 Vern. 690.

(b) Cas. temp. Talb. 157.

(c) Cowp. 299.

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Lord *Mansfield* said (a)—“ The introduction is very material. Introductory words cannot vary the construction of a devise, so as to enlarge the estate of a devisee, unless there are words in the devise itself sufficient to carry the degree of interest contended for. But, wherever they assist to shew the intention of the testator, the Courts have laid hold of them, as they do of every other circumstance in a will, which may help to guide their judgment to the right and true construction of it,” and here, the words of the introductory, coupled with the residuary clause, are sufficiently large and comprehensive to shew that the testator meant to dispose of the whole of his estate; and that the lands not specifically devised by the will should pass to his executor and residuary legatee. Although it may be said, that the words, ‘ all the *rest*,’ in the residuary clause, are words of reference, and descriptive of property *ejusdem generis*, namely, worldly goods, bonds, notes, book debts, and ready money, which must be classed as chattels, yet they are immediately followed by the words, “ and every thing else I die possessed of,” which are sufficient to incorporate and include a real estate, not previously mentioned or disposed of by the will; and the latter words may be read and taken as a distinct and separate clause. In *Hopewell v. Ackland* (b), a testator devised his manor of *B.* to *A.*, and his heirs, and then proceeded thus:—“ *Item*, I devise all my lands, tenements, and hereditaments, to the said *A.* *Item*, I devise all my goods and chattels, money and debts, and whatsoever else I have not before disposed of, to the said *A.*, he paying my debts and legacies;” and Lord Chief Justice *Trevor* said—“ *Item* is an usual word in a will to introduce new distinct matter; therefore, a clause thus introduced, is not influenced by, nor to influence a precedent or subsequent sentence, unless it be of itself imperfect and insensible without reference; therefore, not here,

(a) Cowp. 206.

(b) 1 Salk. 239.

where both clauses are perfect and sensible." And by the concluding clause, "*whatsoever else he had not before disposed of*," his Lordship held, that an estate in fee passed. In *Noel v. Hoy* (a), the testator, after naming his wife as executrix, bequeathed to her *all the property*, of whatever description or sort, that he might die possessed of; and it was held to pass a copyhold estate belonging to the testator, which he had surrendered to the use of his will. In *Smith v. Coffin* (b), the words, *testamentary estate*, were held to pass an estate in fee, there being an introductory clause in the will indicating an intention to dispose of all the testator's worldly estate; and Mr. Justice *Buller* said—"Where it is apparent in the introductory part of the will, that the testator meant to dispose of the whole of his property, and the expressions in the residuary clause *may* include a real estate, that clearly is to be taken in the largest sense, in order to correspond with the introductory part;" and Mr. Justice *Heath* said—"The testator sets out with declaring his intention to dispose of all his property: the word 'testamentary' is a most comprehensive term, and we should interpret it in much too narrow a sense, if we were to confine it to personal property." So, in *Doe d. Penwarden v. Gilbert* (c), where a testatrix, as to her temporal estates and effects, bequeathed several legacies, and devised all her lands to *J. G.*, to whom she also bequeathed all the rest and residue of her goods, personal and testamentary estate and effects whatsoever, and appointed him sole executor; it was held, that he took a fee in the lands, it being the intention of the testatrix, as collected from the will, to dispose of all her property; and Lord Chief Justice *Dallas* there said—"that the case of *Smith v. Coffin* was precisely in point, and that the presumption is, that where it is apparent on the face of the instrument, that all the property should pass, it must be in-

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WILCOX,
Tenant.

(a) 5 Madd. 38.

(b) 2 Hen. Bl. 444.

(c) 6 B. Moore, 268; S. C.
3 Brod. & Bing. 85.

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tended that the testator meant that the whole of his property, both real and personal, should be disposed of; and, that the expressions in the residuary clause might include a real estate, as they are to be taken in the largest sense, in order to correspond with the introductory part of the will;" and Mr. Justice *Park* said—"It is true, that although introductory words will not convey every thing which a testator may possess, yet they are of great use to aid the construction, and shew his general intent;" and here the preamble to the will clearly shews, that the testator meant to dispose of the whole of his property; and in *Tanner v. Wise* (a), it was held, that a devise of all the testator's *worldly estate*, would pass a fee, and that it was the more evident, where he afterwards used the words, '*all the rest and residue of my estate*,' the word *rest* being a term of relation." The principle, therefore, deducible from all the authorities is, that, where the introductory words of a will imply that the testator meant to dispose of the whole of his property, and not to die intestate as to any part of it, the words of the residuary clause may be applied to real as well as to personal estate, if they be sufficient to embrace the former; and here the testator not only bequeathed all the rest of his worldly goods, which apply to his personal effects, but every thing else he should die possessed of, which is sufficient to embrace a real estate not before devised or mentioned in the will. The whole of the residuary clause must be taken together; and, as the executor was to take, not only the rest of the testator's worldly goods, but every thing else he died possessed of, the tenant took an estate in fee in the property in question as such executor and devisee; particularly, as the estate at *St. Kew*, which was devised to him in the body of the will, was charged with four several annuities to his brothers and sisters.

(a) 3 Peere Wms. 295.

Mr. Serjeant *Russell* in reply.—The words, *all the rest*, in the residuary clause, being connected with worldly *goods*, bonds, notes, book debts, and money, must be confined to personal property only, and cannot be extended to the realty. Although the preamble or introductory clause refers to the testator's worldly *property*, and might shew his intention to dispose of all he died possessed of, yet he supposed that he had disposed of all his houses and lands in the body of the will. So, "every thing else he should die possessed of," can only refer to the last antecedent, namely, his worldly *goods*, or personal chattels of a like nature; and it is incumbent on the tenant clearly and distinctly to shew, that the testator meant that the estate in question should pass to him by the residuary clause. In *Hopewell v. Ackland*, the testator gave his brother all his *lands*, goods, chattels, money, and debts, and *whatsoever else* he had in the world; and, as Lord Chief Justice *Gibbs* said in *Doe d. Bunney v. Rout (a)*, the Court held, that the latter words must import something more than the description of personalty which preceded, and, therefore, that the real estate passed under them. In *Noel v. Hoy*, the testator bequeathed all his property, of whatever description he might die possessed of, to his wife; and the copyhold estate might have been necessary to be called in aid for the maintenance and support of herself and her children.

In *Smith v. Coffin*, the residuary clause contained the words "testamentary estate," which Mr. Justice *Buller* said "is as well applicable to real as to personal estate, and that, if it were not applied to the real property in that case, it would be merely tautologous." So, in *Doe d. Penwarden v. Gilbert*, the testatrix bequeathed all the rest and residue of her goods, and personal and testamentary estate, to her executor: here, however, the testator has used the

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(a) 2 Marsh. 400.

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words "worldly goods," which shew, that he did not mean that they should apply to either of his real estates. Besides, in *Doe d. Penwarden v. Gilbert*, the preamble of the will referred to the temporal estates of the testatrix. In *Doe d. Andrew v. Lainchbury (a)*, a devise of all the residue of the testator's money, stock, *property*, and *effects*, was held to pass real as well as personal estates, because it appeared, from other parts of the will, that the testator had applied the words *property and effects* to real estate, as where he began his will by stating—"as to my money and *effects*, I dispose thereof as follows;" and then proceeded to dispose of parts of his *real* estate. So, in *Hogas v. Jackson (b)*, Lord Mansfield considered a devise of all a man's property to be synonymous with real and personal effects. Here, however, no general words are to be found in the residuary clause, which can have reference to the testator's real estate; they are strictly confined to his personal property, namely, his worldly *goods*, securities for money, and money, and every thing else of a like nature, of which the testator might die possessed. The interest in the estate in question, therefore, did not pass to the tenant under the residuary clause of the will, but is vested in the demandant as the testator's heir-at-law.

Lord Chief Justice TINDAL.—The only question in this case is, whether, upon the face of the will, there is a sufficient indication of an intent, on the part of the testator, to devise real property under the residuary clause; because the intention of the testator, as was truly stated by Mr. Justice Buller in the case of *Smith v. Coffin*, is the polar star by which we must be guided. By the preamble or preliminary clause, it is quite clear, that the testator meant to dispose of the whole of his property; for he began the will as follows—namely, "as touching such worldly pro-

(a) 11 East, 290.

(b) Cowp. 304.

perty wherewith it hath pleased God to bless me in this world, I give, devise, and dispose of the same in the following manner and form." Nothing can be more comprehensive than these words, and no one can doubt, but that, at the time he commenced his will, he meditated the disposing of the whole of his property, both real and personal, and that none should remain undisposed of. The question, however, is, whether, on looking at the whole of the will, we can say, that he has carried that intention into effect. The first thing worthy of observation is, that, immediately after the preliminary clause, he proceeds to devise his lands and houses, which shews, that he meant to couple them with his personal property, and to dispose of all his worldly property by the same will. We then come to the residuary clause, upon which the whole question turns, and which is as follows:—"all the rest of my worldly goods, bonds, notes, book debts, and ready money, and *every thing else I die possessed of* I give to my son *George*, whom I make my whole and sole executor." I readily agree, that if this clause had been confined to all the rest of the testator's worldly goods, bonds, notes, book debts, and ready money, it would not have been sufficient to pass the testator's real estates, as the expression *worldly goods* must be restricted to those which immediately follow, namely, bonds, notes, book debts, and ready money, which point, and must be taken to apply, to personalty only; but the testator adds—"and *every thing else I die possessed of*." Now, according to grammatical construction, those latter words must be understood to mean every thing else not before disposed of. The former part of the clause, as to the rest of his worldly goods, may be considered as complete, and ending with the words "ready money;" and the words "every thing else" are not to receive the same interpretation, or necessarily be connected with those immediately preceding. Looking, therefore, at the decla-

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ration of the testator at the beginning of the will, there can be no doubt but that he meant to dispose of the whole of his property; and, on looking at the whole of the will, I cannot but say that it appears to me that he has employed sufficient words to carry his intention into effect. The case of *Smith v. Coffin* bears the nearest resemblance to the present. I am, therefore, of opinion, that, under the residuary clause, the *Carclase* estate passed to the testator's son *George* (the tenant), and that he took an estate in fee.

Mr. Justice PARK.—I am of the same opinion. Morally speaking, there can be no doubt of the testator's intention to dispose of all the property he might die possessed of; but the question is, whether he has so done, or whether he has sufficiently disclosed his intention to do so by the language of the will. That must depend upon the circumstances of each particular case. Although innumerable cases have arisen on the construction of wills, no decision appears to me to apply exactly to the present; and I think my Lord Chief Justice has put a true construction upon this will, although I at first entertained some doubt, as it is a well-known rule of law, that the heir is to be preferred, and that he is not to be disinherited but by express words. Again, the *onus* of proof is thrown on the devisee, and he must shew that the testator meant that the particular estate should pass to him in exclusion of the heir. Now, here, the testator began his will by expressing an intent to devise or dispose of all his worldly property, namely, "such worldly property wherewith it had pleased God to bless him in this world." He then, by distinct paragraphs, disposes of different portions of his property, which he describes most minutely; and, after giving his estate in *Crewkerne*, and all thereunto belonging, without any charge or incumbrance upon it, to *John*, his eldest son and heir, and other estates to his other

sons and daughters, and his estate in *St. Kew* to his son *George* (the tenant), chargeable with four annuities of 10*l.* each to his brothers and sisters; he, the testator, by the residuary clause, gave every thing else he died possessed of to his son *George*, whom he appointed his sole executor. Although the cases of *Smith v. Coffin* and *Doe d. Penwarden v. Gilbert* are extremely strong in favour of the construction put on this will by my Lord Chief Justice, yet this appears to me to be a far stronger case. In *Doe v. Gilbert*, the will commenced with the words—"as for my temporal estates and effects, I give and dispose of the same in manner and form following;" and after two pecuniary bequests, and a devise of all the lands of the testatrix to *J. G.*, the will concluded as follows:—"All the rest and residue of my goods and chattels, personal and testamentary estate and effects whatsoever, I give and bequeath unto the said *J. G.*, whom I make whole and sole executor of this my will." It was there contended, that the words "testamentary estate and effects" must be confined to personalty, as they were connected with the personal estate; and Lord Chief Justice *Dallas* said (*a*)—"There are many cases in which the words 'estate and effects' have been construed to convey a fee, from the company in which they are found; but if here those words only had been used, and the testatrix had devised the lands expressly by a former clause to the devisee, still, by giving him the 'rest and residue' of her 'estate and effects,' they would pass her personal property only, as the lands were expressly devised before; and it must therefore be supposed, that she thought she had disposed of them in the manner she intended. Considering, however, that the case of *Smith v. Coffin* is undistinguishable from the present, as, there, as well as here, the word 'testamentary' was accompanied in the residuary clause by nearly the same expressions, relat-

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(a) 6 B. Moore, 282.

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ing only to personal effects; and, as the testatrix, in the introductory clause, professed to dispose of all her property, I concur with Mr. Justice *Buller* and Mr. Justice *Heath*, that the expressions in the residuary clause might include a real estate, as they are to be taken in the largest sense, in order to correspond with the introductory part of the will; and, therefore, that the word 'testamentary' may be as well applicable to real as personal estate." In *Doe d. Penwarden v. Gilbert*, I concurred with the rest of the Court, on the authority of *Smith v. Coffin*; and here, coupling the introductory with the residuary clause, where, after the testator had given all the rest of his worldly goods, enumerating them as bonds, notes, book debts, and ready money, he added the words "*and every thing else I die possessed of*," there seems to me to be no reason for contending, that words so general should be confined to things *ejusdem generis* as those immediately before specified; and, that we shall be carrying the intention of the testator into effect, by holding, that the *Carclase* estate passed to his son *George* under the residuary clause; and I concur with my Lord Chief Justice, that he took an estate in fee.

Mr. Justice GASELEE.—This is a very nice question, on which I have entertained considerable doubt; and, at first, was inclined to think, that the *Carclase* estate passed to the demandant as the testator's eldest son and heir; but, upon looking more accurately into the will, and the observations made by Mr. Justice *Buller* in *Smith v. Coffin*, which were adopted and confirmed by this Court in the case of *Doe d. Penwarden v. Gilbert*, I think that those cases must govern the present, and that the estate in question passed to the testator's son, *George* (the tenant), under the residuary clause. Although it has been said, that the words "*every thing else I die possessed of*," in that clause, are connected with those of "*all the rest of my worldly*

goods," which can only apply to personalty, *namely*, securities for money, book debts, and money, as therein enumerated; yet, in *Smith v. Coffin*, the testator devised "all the rest and residue of his goods, chattels, personal and testamentary estate whatsoever;" and in *Doe d. Penwarden v. Gilbert*, as in this case, there was a previous devise of all the devisor's lands, and particularly two estates, to the devisee, to whom she also gave and bequeathed all the rest and residue of her goods and chattels, personal and testamentary estate and effects whatsoever; and she appointed him her sole executor; and this Court held, that the devisee took a fee in the lands enumerated and specified in the will, it being the intention of the testatrix, as collected from the will, to dispose of all her property; and that the words "testamentary estate" in the residuary clause, connected with those of "temporal estates" in the introductory clause, were sufficient to convey such an estate, although the clause devising the lands would give him an estate for life only. Here, however, the testator has added the words, "every thing else I die possessed of," after those of "all the rest of my worldly goods." They may, therefore, be considered as distinct bequests; and I concur with the Court in thinking, that, under the latter words, the estate in question passed to the tenant, whom the testator appointed his sole executor; and, that he took an estate in fee.

Mr. Justice BOSANQUET.—I am also of opinion, that the testator's interest in the estate of *Carclase* passed to his son *George*, as devisee, under the residuary clause of the will. The introductory words manifestly shew that the testator intended to dispose of all his real and personal property; and although those of "worldly property" would not of themselves be sufficient to pass real estate, yet they might embrace it, if there are other words in the will mani-

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festing an intent by the testator that such estate should pass. But, in the residuary clause, he has used the words "every thing else I die possessed of;" and the question is, whether the operation of those words is restrained by those with which they are associated; for, if they had stood alone, it is quite clear, that they would have been sufficient to pass or convey real estate; for, in *Huxtep v. Brooman* (a), it was held, that the words "all I am worth," without others to control them, would pass real as well as personal estate. The cases of *Smith v. Coffin* and *Doe d. Penwarden v. Gilbert* are extremely strong to shew that these words are not to be so restrained. In the one, the words "worldly estate," in the other, those of "temporal estates and effects," were introduced at the commencement of the will; and it was held, that those words shewed the devisors' intention to dispose of the whole of their property, and that they were capable of being extended to every species of property that could be disposed of by the wills; and, in order to determine the true construction to be put on both these instruments, the Court looked at the preliminary words as well as the residuary clause, the words of which were of themselves ambiguous. *Doe d. Andrew v. Lainchbury* also appears to me to be an extremely strong case. There, the words "property and effects" in the residuary clause, were of themselves ambiguous, and yet they were held to pass real as well as personal estate, as it appeared from other parts of the will that the testator had applied those words to real estate; and, although Lord *Ellenborough* said—"The testator directed money to be laid out in the purchase of land to be added to his *other adjoining property*. That gives us a standard of his meaning of the word *property*, and shews, that he meant by it real estate"—yet he only mentioned that as a corroborating

(a) 1 Brown's Chan. Cas. 437.

circumstance. However, in this case there appears to me to be a very strong ground for saying that the words "every thing else I die possessed of," coupled with the introductory clause of the will, are not to be restrained by those which immediately precede them, namely, worldly goods, bonds, notes, &c. &c. But we are not driven to that, because there is a break in the clause in which they are found; so that there is no occasion for associating them with those words contained in the former part of the sentence; and in that respect this case differs from that of *Stuart v. The Marquis of Bute*, where the only question was, what property passed by a bequest under the general word *things*? Here, however, the last words of the residuary clause are, "and every thing else I die possessed of, I give to my son *George*, whom I make my whole and sole executor." I therefore concur with the Court in thinking, that, under these latter words, the estate called *Carclase* passed to the tenant, and that he is entitled to it in fee.

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Judgment for the tenant.

SPoonER v. MARY DANKS.

Thursday,
June 9th.

THE plaintiff arrested the defendant, and held her to bail for 300*l.*, for moneys alleged to have been lent and advanced to her by the plaintiff. The defendant applied to Mr. Justice *Park*, at chambers, to be discharged out of custody; and, by consent of the parties, bail were taken for 250*l.*; and, at the trial, the plaintiff obtained a verdict for 38*l.* only. On an affidavit of these circumstances by

In order to entitle a defendant to costs, under the statute 43 Geo. 3, c. 46, s. 3, he must satisfactorily shew the Court that the plaintiff had no reasonable or probable cause for the arrest. Where,

therefore, the plaintiff arrested the defendant for 500*l.*, for money lent, and she set up her coverture as a defence, and the plaintiff recovered a verdict for 38*l.* for sums advanced to the defendant after the death of her husband:—*Held*, that she was not entitled to the protection of the statute, as it was incumbent on her to shew that the plaintiff was aware of her coverture at the time of the arrest.

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the defendant's attorney, Mr. Serjeant *E. Lawes*, on a former day in this term, obtained a rule *nisi*, that the Prothonotary might tax and allow the defendant her costs, pursuant to the statute 43 *Geo. 3*, c. 46, s. 3 (a).

Mr. Serjeant *Bompas* now shewed cause, on an affidavit of the plaintiff, which stated, that the defendant had borrowed large sums of money of him at various times; that he had made repeated applications to her for payment, and that she ultimately refused to make any payment on account; on which the plaintiff was compelled to bring this action, when the defendant pleaded her coverture; that the plaintiff was not aware that she was a married woman until then; and, that the sum for which he obtained a verdict, was the amount of moneys which he had advanced to the defendant after the death of her husband. The learned Serjeant submitted, that; at all events, the defendant herself should have made an affidavit; and that her attorney had been altogether silent as to the fact of her being a married woman at the time the greater part of the advances were made; and the Court will not assume, that the plaintiff was aware of her coverture at the time of the arrest.

Mr. Serjeant *E. Lawes*, in support of his rule, was stopped by the Court.

Lord Chief Justice TINDAL.—I am of opinion that this rule must be discharged. The defendant applied to have costs taxed and allowed her, pursuant to the statute 43 *Geo. 3*, c. 46, the 3rd section of which enacts, "that in all actions wherein the defendant shall be arrested and held to special bail, and wherein the plaintiff shall not recover the amount of the sum for which the defendant in such action shall have

(a) See *infra*.

been so arrested and held to special bail, such defendant shall be entitled to costs of suit, to be taxed according to the custom of the Court in which such action shall have been brought:—Provided, that *it shall be made appear, to the satisfaction of the Court* in which such action is brought, upon motion to be made in Court for that purpose, and upon hearing the parties by affidavit, that the plaintiff in such action had not reasonable or probable cause for causing the defendant to be arrested and held to special bail in such amount as aforesaid."

Now, it appears to me, that, in order to entitle a defendant to costs within this proviso, the obvious intent of the Legislature was, to throw the burthen of proving that the plaintiff had no reasonable or probable cause for the arrest upon the defendant. Here, the plaintiff, in his affidavit of debt, swore, that the defendant was indebted to him in the sum of 500*£*, for money lent and advanced; and we must not discredit his oath; and it was incumbent on the defendant to shew us satisfactorily, that the plaintiff had no reasonable or probable cause for arresting her. The question then is, whether she has so done. She has made no affidavit herself, and it was most important that she should have done so, as it appears that there was a long course of private dealings between her and the plaintiff, who had made frequent advances on her account. Besides, the affidavit of her attorney is altogether silent as to the fact of her coverture; and she should have shewn us that the plaintiff was, or might have been, aware of that fact at the time of the arrest, or that there was some reasonable ground for him to know that she was a married woman when the greater part of the advances were made; but, the plaintiff has disclaimed all knowledge of the coverture until the defendant put in her plea. An application of this nature must be assimilated to the case of an action for a malicious arrest, where it is incumbent on the party complaining to shew that there was no reasonable or probable

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cause for the arrest. I am therefore of opinion, that the defendant has not brought herself within the protection of the statute, and, consequently, that she is not entitled to the relief afforded by the act.

Mr. Justice PARK.—The parties came before me at chambers, on an application by the defendant to be discharged out of custody, on the ground that she was a married woman at the time the greater part of the advances were made to her by the plaintiff; but he had positively sworn that she was indebted to him in the sum of 500*l.*; and I am of opinion, that there is no ground for this application, as it was incumbent on the defendant to shew to our satisfaction, that the plaintiff had no reasonable or probable ground for arresting her, as in the case of an action for a malicious or vexatious arrest. This is, of all others, an application to the discretion of the Court, and ought to have been made on the affidavit of the defendant herself, as the words of the statute are—"upon hearing *the parties* by affidavit;" and we may afford the relief sought, provided we think that such costs ought to be allowed.

Mr. Justice GASELER.—The question is, whether, at the time of the arrest, the plaintiff had a reasonable or probable cause for holding the defendant to bail; and he made oath that she was indebted to him in the sum of 500*l.* The defendant has not shewn us that the plaintiff was aware that she was a married woman at the time of the arrest; on the contrary, the plaintiff has denied it in terms—she might have held herself out to the world as a single woman; and I have no doubt but that the plaintiff advanced money to her, amounting in the whole to the sum for which she was arrested.

Mr. Justice BOSANQUET.—I am of the same opinion.

The defendant certainly has not satisfied us that there was no reasonable or probable ground for the arrest. It was her duty to have done so, and she has made no affidavit, neither does her attorney state that the plaintiff knew that she was a married woman; and he has sworn, that he was not aware of that fact till she pleaded her coverture. Although, in the case of *Lord Huntingtower v. Heely (a)*, where a defendant was arrested for a sum, in respect of the greater portion of which the plaintiff knew, at the time, that the defendant had obtained a discharge under the insolvent debtors' act, it was held, that he was entitled to have his costs taxed under the statute 43 *Geo. 3*; yet, here the knowledge of the coverture at the time the defendant was held to bail, is positively denied by the plaintiff. So, in *Day v. Picton (b)*, which is an extremely strong case, where the plaintiff, who had sold goods to the defendant, to be paid for half in ready money and half by bill at three months, and the defendant having refused to pay the half in ready money, the plaintiff arrested him for the full price of the goods: it was held, that the defendant was entitled to his costs; yet, Mr. Justice *Bayley* said—"Any lawyer, to whom the plaintiff might have mentioned the circumstance, must have known, that the sum for which he arrested the defendant did not constitute a debt till the credit had expired." Here, however, it does not appear that the plaintiff knew that the defendant was a married woman at the time of the arrest; and she might have represented herself as being single when the various sums for which she was held to bail were advanced to her by the plaintiff.

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Rule discharged.

(a) 7 *Dow. & Ryl.* 369.

(b) 10 *Barn. & Cress.* 120.

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Saturday,
June 11th.

SADLER and LARGE v. SAMUEL CLEAVER and CHARLES CLEAVER.

The defendant having become bankrupt and obtained his certificate, the Court may stay the proceedings in the action before judgment, although the 136th section of the statute 6 Geo. 4, c. 16, only authorises the Court to discharge a bankrupt taken in execution; but the defendant having created unnecessary expense and delay to the plaintiff, he was required to pay all the costs incurred from the day the cause might have been tried, to the time of the application to stay the proceedings.

THIS was an action of debt, and brought to recover the sum of 1084*l.*, which an arbitrator, by his award, found to be due from the defendants to the plaintiff. The circumstances of the case were as follow:—

The defendants pleaded, jointly, several special pleas; and, on the cause coming on for trial, on the 2nd of *March*, 1829, they pleaded, *puis darrein continuance*, a joint plea of a release executed to them by the plaintiff *Large*; upon which, the plaintiff *Sadler*, on the ground of collusion between *Large* and the defendants, obtained an injunction in the Court of *Chancery*, to restrain the defendants from using such release in support of their plea; and the cause went down to trial again on the 2nd of *June*, 1830, when the defendant *Samuel Cleaver* pleaded separately, *puis darrein continuance*, another plea of release executed to him by the plaintiff *Large*; and the defendant *Charles Cleaver* pleaded separately, *puis darrein continuance*, that he had become a bankrupt, and duly obtained his certificate under a commission sued out against him on the 30th *July*, 1829. To this plea of bankruptcy the plaintiffs demurred, and obtained judgment on demurrer in the last *Hilary Term*, viz. on the 24th *January*; upon which, the plaintiff *Sadler* obtained another injunction, restraining the defendants from availing themselves of the last-mentioned release, in bar of this action. Notice of trial was accordingly given for the Sittings after the last *Hilary Term*; but, on the 25th *January*, the defendants again pleaded *puis darrein continuance*, separate pleas of the bankruptcy of the plaintiff *Large*, in *November*, 1830.

In the last term, the Court ordered those latter pleas to be set aside, and Mr. Serjeant *Jones* afterwards obtained a

rule *nisi*, to stay all further proceedings in the cause against the defendants, on affidavits, which stated, that *Samuel Cleaver* had become bankrupt in *August*, 1830, and that he had since duly obtained his certificate; and, that the defendant *Charles Cleaver* had become bankrupt in *July*, 1829, and had obtained his certificate, as alleged in his plea.

The learned Serjeant referred to the statute 6 *Geo.* 4, c. 16, s. 121, which enacts, "that every bankrupt who shall have duly surrendered, and in all things conformed himself to the laws in force concerning bankrupts at the time of issuing the commission against him, shall be discharged from all debts due by him when he became bankrupt, and from all claims and demands thereby made proveable under the commission, in case he shall obtain a certificate of such conformity, so signed and allowed, and subject to such provisions as thereafter directed;" and in *Davis v. Shapley* (a), it was held, that the goods as well as the person of the bankrupt, are protected by that section. There, the goods of a certificated bankrupt, acquired after the bankruptcy, having been seized under a *fiери facias* issued upon a judgment, in respect of a debt due before the bankruptcy, the Court, on motion, set aside the *fiери facias*; and Mr. Justice *Bayley* said—"The enactment is express. I think, therefore, that a creditor, in respect of a debt due before the bankruptcy, is not at liberty to sue out execution against the goods of his debtor, after the latter has become bankrupt and obtained his certificate. The 126th section points out, in a particular manner, the remedies to be followed, where a bankrupt, after certificate, is arrested for a debt which was proveable under the commission, or is taken in execution upon judgment obtained before the certificate: in the one case, he may be discharged upon common bail; in the other, a single Judge may order the offi-

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(a) 1 Barn. & Adolph. 54.

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cer in whose custody he is, to discharge him; such order is made obligatory on the officer, and he is indemnified." So, here the defendants were discharged by their certificates from the debt alleged to be due to the plaintiffs; and all further proceedings in the cause will be vexatious, and productive of unnecessary expense to the parties.

Mr. Serjeant *Taddy*, on the first day of this Term, shewed cause on affidavits, which stated in substance, that both the defendants had become bankrupt in 1813; that no dividend had been paid upon *Charles Cleaver's* bankruptcy in *July*, 1829, or on *Samuel Cleaver's* in *August*, 1830, and that there were no assets for that purpose; that the plaintiff *Sadler* believed that the commissions were concerted, and sued out with a view to defeat this action, and that the certificates had been obtained by fraud; that the attorneys who were employed to defend the action had sued out the commissions of bankruptcy, and acted under them for the defendants up to the time the certificates were obtained; and that the defendants had frequently been heard to say, that, if they were pressed for the payment of the plaintiffs' debt, they must go into the *Gazette*; and that their estate and effects would not be sufficient to pay five shillings in the pound.

The learned Serjeant submitted, that, although the application to stay the proceedings was made to the discretion of the Court, yet, that under the circumstances, they would not interfere, or assist the defendants, but leave them to plead their bankruptcy, when the plaintiffs might be able to shew that the commissions were concerted and sued out with a fraudulent intent. The 126th section of the statute does not extend to cases apparently within the act, if it appear that the certificate was obtained by fraud, or that there are other good grounds for disputing its validity; and, where these instances occur, a Judge will not interfere in a summary way, but leave the defendant to plead his bankruptcy

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and certificate (a). Although, in *Read v. Sowerby* (b), the proving a debt under a commission issued against a person who had before compounded with his creditors, and whose estate under the commission had not nor would produce fifteen shillings in the pound, but who, before he became bankrupt, paid the creditors with whom he compounded the full amount of their debts, was held to discharge the bankrupt in respect of his future estate and effects from an action for the debt so proved; yet, there the creditor had made his election, by proving the debt under the commission. In *Davis v. Shapley*, although the Court held, that the goods, as well as the person of the bankrupt are protected by the 126th section of the statute; yet, there the application was to set aside an execution which had been sued out against the goods of a certificated bankrupt, and which he had acquired after the bankruptcy. Here, however, the Court will not interfere and stay the proceedings on motion, but leave the defendants to plead their certificates, when the plaintiffs may reply that they were obtained by fraud. In *Thornton v. Dallas* (c), to a plea of bankruptcy, the plaintiff replied, that before the issuing of the commission in the plea mentioned, the defendant was discharged as a bankrupt; and, that afterwards he was again discharged as a bankrupt, and that his estate had not nor would produce sufficient to pay every creditor under the commission fifteen shillings in the pound for their respective debts; and the replication was held to be an answer to the plea; and, that although the prior commission was superseded by consent, the second bankruptcy did not protect future effects, unless fifteen shillings in the pound were paid under the second commission; and here, as no dividend has been

(a) See Archbold's Bankrupt cited.

Laws, 3rd edition, by Flather, (b) 3 Mau. & Selw. 78.

204, and the authorities there (c) 1 Doug. 46.

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paid under either of the commissions, the plaintiffs have a right to reply that they were sued out with a view to defeat this action, and that the certificates were obtained by fraud. At all events, the defendants have another remedy, by a writ of *audita querela*.

Mr. Serjeant *Jones* in support of his rule.—It has not been disputed that both the defendants have become bankrupt, and obtained their certificates; and, it is equally clear, that the plaintiffs' debt is proveable under the commissions; and the Court will not assume that the commissions were concerted, or that the certificates have been obtained by fraud. The defendants have merely applied to stay all further proceedings in the action; and, although it has been said that they have a remedy by *audita querela*, yet the Court will interpose summarily; for if the plaintiffs were to proceed to trial, the question whether the commissions were sued out fraudulently could not be raised at *Nisi Prius*, and the certificates are not revoked, but still remain in full force. By the 127th section of the statute 6 Geo. 4, c. 16, it is provided, that where a bankrupt has been bankrupt before, or compounded with his creditors, or been discharged by any insolvent act, unless his estate shall produce sufficient to pay every creditor fifteen shillings in the pound, his future estate and effects shall vest in the assignees under the commission, notwithstanding the certificate, which shall only have the effect of protecting his person from arrest and imprisonment. The defendants, therefore, are clearly entitled to their discharge from this debt by their certificates; and, if the plaintiffs proceed to judgment and execution, it will be incurring an unnecessary expense, and the present application is to the legal discretion of the Court. In *Humphreys v. Knight (a)*, a bankrupt, who obtained his certificate af-

(a) 6 Bing. 572; S. C. 4 Moore & Payne, 375.

ter issue, and before judgment, having, after judgment, been rendered in discharge of his bail, the Court ordered him to be discharged on a summary application, although he had not pleaded his certificate *puis darrein continuance*. That case was decided on the principle to be drawn from the 121st section of the statute, which Lord Chief Justice *Tindal* said—"acts as a complete discharge from the time the certificate is granted; and, as the bankrupt might have obtained relief on *audita querela*, the Court might interpose summarily." That is the true principle; and, in *Todd v. Maxfield* (a), where the defendant obtained a certificate under a commission of bankruptcy before trial, and did not plead it *puis darrein continuance*, the Court relieved the bail on motion. The case of *Davis v. Shapley* is an express authority to shew, that the goods, as well as the person of the bankrupt, are protected by the 121st section of the statute; and Mr. Justice *Littledale* there said (b)—"If the debt was contracted before the commission, it was proveable; and the 121st section says, that the bankrupt shall be absolutely discharged from such debt."

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The Court required time to look into the affidavits, for the purpose of ascertaining the exact dates to which they referred. The case, therefore, stood over until this day, when—

Lord Chief Justice TINDAL said, this is an application to stay all further proceedings in this cause, on the ground, that the two defendants have become bankrupt and obtained their certificates since the action was brought. Properly speaking, the application comes at an earlier stage of the proceedings, than that in which the late statute, 6 Geo. 4, c. 16, calls upon the Court to interfere; for the 126th section

(a) 3 Barn. & Cress. 222.

(b) 1 Barn. & Adolp. 58.

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only empowers us to order the discharge of a bankrupt taken in execution. Yet, if the proceedings go on, they must lead the parties to that point; and we think that the clause is not imperative in that respect, but that the period for the bankrupt's discharge must be in some degree discretionary; and, on looking at the record in this case, it appears, that, from the 2nd *March*, 1829, to the time of this motion, much vexatious delay and expense have been interposed to the plaintiffs' recovery; and, although the defendants must be ultimately entitled to their discharge, they having obtained their certificates, yet, we think we ought not to yield to this application without imposing on the defendants the terms of their paying all the costs incurred at law, subsequently to the 2nd *March*, 1829, being the day the cause was to have come on for trial. Therefore, on their paying such costs, this rule must be made—

Absolute.

Saturday,
June 11th.

LIGGINS v. INGE and Another.

A parol licence, after it is executed at the expense of the grantee, is not countermandable by the grantor. Where, therefore, the plaintiff's father gave the defendants leave, by parol, to lower the bank of a river and erect a weir; whereby a part of the water which

THIS was an action on the case. The declaration, which was intitled of *Michaelmas* Term, 1828, stated, that the plaintiff, before and at the time of the committing the grievances by the defendants as thereinafter next mentioned, was, and from thence hitherto had been, and still was, lawfully possessed of and in a certain corn-mill, with the appurtenances, situate and being in the county of the city of *Coventry*, and, by reason thereof, of right ought to have had and enjoyed, and still of right ought to have and enjoy, the benefit and advantage of the before flowed to the plaintiff's mill was diverted:—*Held*, that his son could not maintain an action against the defendants for continuing the weir, although his father, a few years after the licence was given, had required them to raise up the bank and pull down the weir.

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water of a certain stream or watercourse, which, during all that time, ought to have run and flowed in its usual and proper course, flow, and current, and until the obstructions and diversions thereafter next mentioned of right had run and flowed, and still of right ought to run and flow in its usual and proper course, flow, and current, into the said corn-mill of the plaintiff, for supplying the same with water, for the working and more beneficial use and enjoyment thereof; yet, that the defendants, well knowing the premises, but contriving, and wrongfully and unjustly intending, to injure and prejudice the plaintiff in that respect, and to deprive him of the use, benefit, and advantage of the water of the said stream or watercourse, and to hinder and prevent him, the plaintiff, from working his said mill in so ample and beneficial a manner as he had theretofore done, and of right ought to have done, and to injure him in the way of his trade and business of a miller, which he, during all the time aforesaid, exercised, used, and carried on, and still did use, exercise, and carry on therein, and to put him to great charge, expense, trouble, and inconvenience, whilst he, the plaintiff, was so possessed of the said mill with the appurtenances as aforesaid, and so exercised and carried on his said trade or business therein, to wit, on &c., and on divers other days and times between that day and the commencement of this suit, to wit, at &c., wrongfully and injuriously cut down, pulled down, lowered, and made, and caused and procured to be cut down, pulled down, lowered, and made, a great part, to wit, fifty feet of one of the banks of the said stream or watercourse, divers, to wit, ten feet lower than the same had theretofore been, or of right ought to have been, or still of right ought to be, and then and there wrongfully and injuriously erected, put down, set down, placed and deposited, and caused and procured to be erected, put down, set down, placed, and deposited in and upon the

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said bank of the said stream or watercourse, at the said part thereof so lowered as aforesaid, and above the said corn-mill of the plaintiff, divers, to wit, ten sluices, ten dams, ten weirs, ten fletchers, and ten boards, and wrongfully and injuriously kept and continued, and caused to be kept and continued, the said sluices, dams, &c. &c., so there respectively erected, put down, &c. &c., as aforesaid, for a long space of time, to wit, from thence hitherto, and thereby and therewith, and by means thereof, during all the time aforesaid, wilfully and wrongfully diverted and turned and let off, and caused to run and flow, divers large quantities of the water of the said stream or watercourse out of its proper course and channel, and away from the said corn-mill of the plaintiff, and stopped, prevented, and hindered divers other large quantities of the water of the said stream or watercourse from running or flowing along in its usual and proper course, flow, and current, to the said corn-mill, and from supplying the same with the usual, proper, and regular flow of water for the necessary and convenient working thereof, as the same of right ought to have done, and otherwise would have done, and, by reason thereof, caused and procured divers other large quantities of the water of the said stream or watercourse to run and flow to the said mill in unequal quantities, and more irregularly than the same had theretofore done, or of right ought to have done, or still of right ought to do;—by means of which said several premises, and for want of a sufficient, regular, and proper supply of water, the plaintiff, on the said several days and times aforesaid, could not work or use his said corn-mill, or follow, use, or exercise his said trade or business of a miller therein, in so large, ample, and beneficial a manner as he might and otherwise would have done, but was thereby, during all the time aforesaid, deprived of the use and enjoyment of his said corn-mill, and of all the benefits, pro-

fits, gains, and advantages, which he otherwise might and would have made, by carrying on his said trade or business therein, to wit, at &c.

The defendant pleaded the general issue of not guilty, and the statute of limitations, upon which issues were joined.

The cause came on for trial at *Warwick*, at the Spring Assizes, 1829, when an order of *Nisi Prius* was made, with the consent of the parties, that a verdict should be entered for the plaintiff for 500*l.* damages, subject to the award of an arbitrator, who was to be at liberty to direct for whom and for what sum the verdict should finally be entered, and to settle all matters in difference between the parties, and order and determine what should be done by either party respecting the matters in dispute.

The arbitrator made his award on the 25th *January*, 1830, by which he found that the plaintiff was the owner and occupier of an ancient water corn-mill, situate upon the river *Sherborne*, in the county of *Warwick*; that the defendant *Inge* was the owner, and the defendant *Grimmitt* the occupier, as tenant to *Inge*, of another ancient water corn-mill, also situate upon the same river, and higher up the stream than the mill of the plaintiff:—that this action was brought to recover a compensation in damages from the defendants for the cutting down and lowering, and keeping and continuing so cut down and lowered, a part of the bank of the said river, situate and being between the mill of the defendants and the mill of the plaintiff, and, on a part of the said bank so lowered, built and erected, and kept and continued so built and erected, a certain weir or fletcher, and, by that means, caused large quantities of the water of the said river which otherwise would, and always before had, and still of right ought to have flowed to and through the plaintiff's mill, to flow in a new course or chanel, whereby the plaintiff was deprived of a due supply of water for his said mill; that this action was com-

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menced in *Michaelmas* Term, 1828, and that that part of the bank of the river situate and being between the said mills, was so cut down and lowered as above mentioned, and the said weir or fletcher built and erected there by the defendant *Inge* in the month of *June*, 1822; that the said bank was kept so cut down and lowered, and the weir or fletcher so kept and continued as aforesaid by the defendants, from *June*, 1822, up to the time of the commencement of the action; that the part of the bank so cut down and lowered, and upon which the weir or fletcher was built and erected in *June*, 1822, then and still was the soil and freehold of the defendant *Inge*, and was occupied by the defendant *Grimmitt* at the time of the commencement of this action, under a demise from *Inge*; that, at the time when the bank of the river was so cut down and lowered, and the weir or fletcher so built and erected as aforesaid, the mill of the plaintiff was the property of, and was occupied by one *George Liggins*, the plaintiff's father, and that the plaintiff derived his title to the mill from his said father; that the defendant *Inge*, at the time when he cut down and lowered the bank, and built and erected the said weir or fletcher as aforesaid, *had a parol licence to do the same from the said George Liggins*, and that the defendant *Inge* did the same at his own proper costs and expenses; that the lowering or cutting down the said bank, and the keeping the same so lowered and cut down as aforesaid, and the erecting and building the said weir or fletcher, and the keeping the same so built and erected, were injurious to the mill of the plaintiff at the time of the bringing this action, by diverting into another channel the water which was necessary for the proper working of his said mill; and that, in the year 1827, the said *George Liggins*, the father of the plaintiff, being then still in the occupation of the mill now in the occupation of the plaintiff, represented and made known to the defendants that the lowering and cutting down the bank, and keeping it

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so lowered and cut down, and the building the weir, and so keeping it, were injurious to him the said *George Liggins*, in the occupation and enjoyment of his mill, and he at the same time called upon the defendants to fill up and raise the bank to its ancient and accustomed height, and to pull down and remove the said weir:—whereupon the arbitrator awarded, that the verdict already entered up for the plaintiff should stand, but that the damages should be reduced to one shilling; and he also directed that the defendants should, at their own proper costs and charges, raise, elevate, and heighten the weir or fletcher along the whole length and surface of it to the height of one inch and a half above its present height or elevation, and should keep and continue it so elevated and heightened; and that the defendants should enjoy the weir so elevated and heightened accordingly, and as long as the said weir should be kept and continued so elevated and heightened, without further molestation from the plaintiff.

In the last term, the defendant obtained a rule calling upon the plaintiff to shew cause why the award should not be set aside; when the Court directed that the matter of the award should be stated in a special case, and argued by counsel, the objection being, that the award had been made for the plaintiff under a mistake of the law by the arbitrator.

The case came on for argument on a former day in this term.

Mr. Serjeant *Merewether*, for the plaintiff.—The award is good in law, inasmuch as the action being an action upon the case for a continuing injury, the statute of limitations does not apply, and the parol licence given by the plaintiff's father in *June*, 1822, as stated in the award, was revocable. *First*, although it has been held that the statute 21 *Jac.* 1, c. 16, s. 3, must be confined to the particular actions therein enumerated; yet it is clear that

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it extends to an action upon the case for a tort or injury done to lands or other real property; and here, the plaintiff alleged in his declaration, and the arbitrator has so found, that the injury done to the plaintiff by the defendants' cutting down the bank and erecting the weir was a continuing injury. In *Brent v. Haddon* (a), which was an action on the case for erecting *ripas stagni molen-dini* so high, that, by the exaltation of the water, it overflowed the plaintiff's meadow, and yet did so—it was held, that the continuance was a nuisance for which the action well lay; and although, in *Williams v. Morland*, Mr. Justice *Littledale* said (b), "Water is of that peculiar nature, that it is not sufficient to allege in a declaration, that the defendant prevented the water from flowing to the plaintiff's premises. The plaintiff must state an actual damage accruing from the want of the water." Yet here, the plaintiff has so done, and the continuance of the weir from the time of the representation to the defendants by the plaintiff's father in 1827, to the commencement of this action, is sufficient to entitle the plaintiff to recover. Although the arbitrator has found, that, at the time the defendant *Inge* cut down and lowered the bank, and erected the weir, he had a parol licence to do so from the plaintiff's father, yet such licence was nugatory and revocable, and cannot avail the defendants. Besides, five years afterwards, he represented to the defendants that the lowering the bank and so keeping it, and the continuing the weir, were injurious to the occupation of his mill, and he at the same time called on the defendants to raise the bank and remove the weir; that, therefore, was a revocation of the licence. But if not, it is clear that the plaintiff's father could not transfer by parol any right over the water which supplied his mill, for the grant of such a right could only pass by deed. In *Hewlins v.*

(a) Cro. Jac. 555.

(b) 2 Barn. & Cress. 917; S. C. 7 Dow. & Ryl. 591.

Shippam (a), where it appeared in evidence that a licence to construct and continue a drain was by parol, it was held, that, as the right claimed in the declaration was a freehold right, assuming, that it was an easement only upon the land of another, and not an interest in the land, it could not be created without deed; and Mr. Justice *Bayley*, in delivering the judgment of the Court, said (b)—“A right of way, or a right of passage for water (where it does not create an interest in the land) is an incorporeal right, and stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, &c. It lies not in livery, but in grant, and a freehold interest in it cannot be created or passed (even if a chattel interest may, which I think it cannot) otherwise than by deed.” Besides, in this case, the licence was without consideration, and ought not to bind the party granting it, much less his successor; and by his mere assent at the time, it is not to be assumed that he meant it to apply to all future contingencies, or to an injury which might arise to his mill by the erection of the weir, and which he could not then anticipate or foresee. A party who has a mere parol licence granted to him without any consideration, must take upon himself the risk of its being countermanded; and the grantor is not bound to continue it, when it becomes injurious to his interest; and he ought not to be estopped from enforcing his former rights. In *Barker v. Richardson* (c), where lights had been enjoyed for more than twenty years, contiguous to land, which, within that period, had been glebe land, but was conveyed to a purchaser under the statute 55 *Geo. 3*, c. 147; it was held, that no action would lie against the purchaser for building, so as to obstruct the lights, inasmuch as the rector, who was tenant for life, could not grant the easement; and, therefore, that no valid

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(a) 5 Barn. & Cress. 221; *S. C.*
7 Dow. & Ryl. 783.

(b) *Id.* 229.

(c) 4 Barn. & Ald. 579; *S. C.*
7 Dow. & Ryl. 796.

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grant could be presumed. So, here, as the plaintiff derived his title to the mill from his father, he ought not to be bound by the licence given to the defendants, particularly, as it was without consideration; and if they wished to have protected themselves by it, they ought to have required a grant by deed. Although the case of *Winter v. Brockwell* (a) may be relied on for the defendants, to shew that a parol licence cannot be recalled; yet Lord *Ellenborough* there said—"That he thought it very unreasonable, that, after a party had been led to incur expense in consequence of having obtained a licence from another to do an act, and that the licence had been acted upon, that other should be permitted to recall his licence, and treat the first as a trespasser for having done that very act;" yet there, the defendant claimed no right or easement upon the plaintiff's land; and the only point decided was, that as the plaintiff had consented to the obstruction of such his easement, and allowed the defendant to incur expense in making such obstruction, the plaintiff could not retract that consent, without reimbursing the defendant such expense. Here, however, the defendant's remedy, if any, is in a Court of equity, and although the plaintiff does not complain of the immediate act done, yet he has a right of action for the consequences resulting to him from that act, namely, from the continuance of the weir and the not raising the bank. Although, in *Winter v. Brockwell*, Lord *Ellenborough* relied mainly on *Web v. Paternoster* (b), as laying down the rule that a licence executed is not countermandable, but only when it is executory; yet that case only decided that a grant of a licence to the plaintiff to stack hay upon land for a convenient time till he could sell it, did not amount to a lease of the land, the agreement being for an easement, and not for an interest in the land. Besides, that was not a case of freehold interest, and no ob-

(a) 8 East, 308.

(b) Palmer, 71.

jection was taken that the right lay in grant, and, therefore, could not pass without deed; and although Mr. Justice *Haughton* said, that a licence executed is not countermandable, yet it must be considered as a mere *obiter dictum*, as it was not necessary to the decision of the case. Again, although the plaintiff's father could not have revoked the licence to build the weir, yet the plaintiff has a right of action against the defendants for continuing it, as if a person permit another to turn out a horse in his park, although the person might be put to some expense in sending it there; yet, if the animal becomes vicious or unruly, or does any injury, the party who gave permission to have him put there, may order him to be taken out whenever he pleases. Although, in *Tayler v. Waters* (a), Lord Chief Justice *Gibbs* referred to *Web v. Paternoster*, and *Winter v. Brockwell*, as establishing the principle that a beneficial interest to be exercised upon land, may be granted without deed, and cannot be countermanded, at least after it has been acted upon, yet the latter case was decided under very peculiar circumstances. In *Tayler v. Waters*, the question was not whether a parol licence was revocable, but whether a ticket for admission to the opera was an interest in land; and the Court held that it was not, but that it was a licence, irrevocable, to permit the plaintiff to enjoy certain privileges; and it was proved that it was in the ordinary course of the management of the theatre to make such grants. In *Wood v. Lake* (b) there was a valuable consideration for stacking the coals, but no interest in land passed, and the only question was as to the duration of the licence. In the case of *The King v. The Inhabitants of Horndon-on-the-Hill* (c), the taking a grant of a licence from the lord of a manor to erect a cottage on a piece of land, rendering an annual rent, was held to be a licence only, and not a grant of any interest in land; and Lord

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(a) 2 Marsh. 560; S. C. 7 Taunt.
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(b) Sayer, 3.

(c) 4 Maule & Selw. 562.

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Ellenborough said—"A licence is not a grant, but may be recalled immediately. We cannot take into our consideration what it may be conjectured a Court of equity would determine. We ought to see that the party has clearly an equitable interest, and not merely such a claim as might possibly induce a Court of equity to interpose in some way or other;" and Mr. Justice *Bayley* said—"We cannot know how a Court of equity would deal with this case; probably the utmost that it would do, would be to grant an injunction if an ejectment was brought." So, if a person has a licence to build a house on the land of another, his remedy is in equity, if he be required to remove it; and, in *Festiman v. Smith (a)*, where the plaintiff declared in case for obstructing a water-course, upon his possession of a mill with the appurtenances, and that, by reason of such his possession, he had a right to the use of water running in a certain tunnel to the mill; it was held, that such allegation was not supported by proof, that the tunnel was made on the defendant's land, which he had agreed to let the plaintiff have for this purpose, for a certain consideration, but of which no conveyance was made by him to the plaintiff, and he had since refused assent; because the plaintiff had not the water by reason of his possession of the mill, but by parol licence or contract, which could not pass the title to the land, and as a licence, was revocable, and revoked. That case is precisely in point, whilst that of *Winter v. Brockwell* cannot be supported on principle or authority, and there, as in this case, the defendant's remedy was in equity, and not at law.

Mr. Serjeant *Goulburn*, in support of his rule.—The statute of limitations is out of the question. The plaintiff had no cause of action against the defendants, and the nature of the action must be looked at; in *Williams v.*

(a) 4 East, 107.

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Morland, Mr. Justice *Bayley* said (a)—“Flowing water is originally *publici juris*. So soon as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriates it. Subject to that right, all the rest of the water remains *publici juris*. The party who obtains a right to the exclusive enjoyment of the water, does so in derogation of the primitive right of the public. Now, if this be the true character of the right to water, a party complaining of the breach of such a right ought to shew that he is prevented from having water which he has acquired a right to use for some beneficial purpose;” and Mr. Justice *Holroyd* referred to *Bealey v. Shaw* (b), where it was held, that, although the defendants might have originally appropriated the whole of the water of the river *Irwell* to themselves, yet they could not do so after the plaintiff had appropriated the residue of the unappropriated water to himself. So, a party may relinquish a right to the whole of the water of a stream which flows through his lands; but, if he does so, he cannot afterwards set it up again. Here, the right to the water was originally in the plaintiff’s father, and when he allowed the bank to be lowered, and the weir to be erected, he abandoned his right as to the surplus water, and his son cannot set up a claim at a distant period; particularly, as it was surrendered voluntarily by his ancestor. There might, for any thing that appears to the contrary, have been a valuable consideration for the licence. The act was complete when the weir was built, and the statute of limitations began to run from that time; and as the bank was also lowered with the consent of the plaintiff’s father, the plaintiff himself has no cause of action for the continuing injury, for *volenti non fit injuria*. But it has been said, that, the licence being by parol, it was revocable, and in fact was revoked by the plaintiff’s father, five years after it was

(a) 2 Barn. & Cress. 943.

(b) 6 East, 208.

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given; but the case of *Winter v. Brockwell* is an authority expressly in point, and has never been questioned or impugned. There, it was held, that a parol license to put a skylight over the defendant's area (which impeded the light and air from coming to the plaintiff's dwelling-house through a window) could not be recalled at pleasure, after it had been executed at the defendant's expense, at least, not without tendering the expenses he had been put to; and, therefore, that no action lay as for a private nuisance, in stopping the light and air, and communicating a stoach from the defendant's premises to the plaintiff's house by means of such sky-light. There, as in this case, the erection was made on the defendant's own property, and no interest in the land was conveyed to the defendant by the plaintiff's father at the time he gave them leave to erect the weir. In *Hewlins v. Shippam*, Mr. Justice Bayley referred to *Winter v. Brockwell*, and said (a)—“That it was not the case of the grant of an easement to be exercised upon the grantor's land, but a permission to the grantee to use his own land in a way in which, but for an easement of the plaintiff's, such grantee would have had a clear right to use it.” That is precisely this case; and although it has been said that the *dictum* of Mr. Justice Haughton, in *Web v. Paternoster*, cannot be considered as an authority, yet it was distinctly and expressly affirmed by Lord Chief Justice Gibbs, in *Taylor v. Waters*. Besides he was the Attorney-General at the time the case of *Winter v. Brockwell* was decided, and led the cause for the plaintiff. In *Taylor v. Waters* his Lordship, after referring to *Web v. Paternoster*, and *Winter v. Brockwell*, said—“These cases shew that a beneficial interest to be exercised upon land may be granted without deed, and cannot be countermanded, at least after it has been acted upon.” That is the true principle; and here, all that was done was done upon the land of the grantees,

(a) 5 Barn. & Cress. 233

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and at their own expense, and no interest in land passed or was conveyed by the licence of the grantor. In *Williams's Saunders* (a), it is said—"A licence to be exercised on land may indeed be granted by parol, inasmuch as it conveys no interest in the land, as a licence to stack hay, to occupy a box at the opera, to *put a skylight over the defendant's area*, (and *Winter v. Brockwell* is referred to); and when acted upon, it cannot be countermanded, at least, not without putting the defendant in the condition in which he was before it was granted." The case of *The King v. The Inhabitants of Horndon-on-the-Hill* does not apply to the present question; as there the licence was a mere personal licence, and there was no grant of any interest in land. Besides, the interest that the party took under the licence was of a doubtful nature, and it was admitted that he had not a legal interest; and, as Lord *Ellenborough* said, the licence, not being a grant, might be recalled the day after it was granted. In *Barker v. Richardson*, the ground of the decision was, that a tenant for life cannot grant an easement, for, as Lord Chief Justice *Abbott* said,—"Admitting that twenty years' uninterrupted possession of an easement is generally sufficient to raise a presumption of a grant; in this case, the grant, if presumed, must have been made by a tenant for life, who had no power to bind his successor." In *Fentiman v. Smith*, the only question was, whether an interest in land passed by a parol licence; and Lord *Ellenborough* said—"The title to have the water flowing in the tunnel over the defendant's land could not pass by parol licence without deed; and the plaintiff could not be entitled to it, as stated in the declaration, by reason of his *possession of the mill*." But here, the acts were done on the defendant's own land, and at their expense; there was no grant of land, or of any interest in

(a) 5th edit. by Patteson & Williams, Vol. 2, p. 113 a, n. (a).

(b) 4 Barn. & Ald. 582.

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land, but merely a relinquishment by the plaintiff's father of his right to surplus water, which was found to be unnecessary for the working of his mill; and although it may be said that the licence to lower the bank and build the weir might not give the defendants a right to take or use the water, yet it was the inevitable consequence of such acts.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court, as follows:—

It will be unnecessary, on the present occasion, to consider more than one of the questions which have been argued at the bar, *viz.* whether the present action, upon the facts stated in the award of the arbitrator, is maintainable against the defendants.

The action is, in point of form, an action of tort, and charges the defendants with wrongfully continuing a certain weir or fletcher, which the defendants had before erected upon one of the banks of the river, and by that means wrongfully continuing the diversion of the water, and preventing it from flowing to the plaintiff's mill in the manner it had been formerly accustomed to do. It appeared in evidence before the arbitrator, that the bank of the river which had been cut down, was the soil of the defendants, and that the same had been cut down and lowered, and the weir erected, and the water thereby diverted by them, the defendants, and at their expense, in the year 1822, under a parol licence to them given for that purpose by the plaintiff's father, the then owner of the mill; and that, in the year 1827, the plaintiff's father represented to the defendants, that the lowering and cutting down the bank were injurious to him in the enjoyment of his mill, and had called upon them to restore the bank to its former state and condition, with which requisition the defendants had refused to comply.

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The question, therefore, is, whether such non-compliance, and the keeping the weir in the same state after, and notwithstanding the countermand of the licence, is such a wrong done on the part of the defendants as to make them liable to this action.

The argument on the part of the plaintiff has been, that such parol licence is, in its nature, countermandable at any time, at the pleasure of the party who gave it; that, to hold otherwise, would be to allow to a parol licence the effect of passing to the defendants a permanent interest in part of the water which before ran to the plaintiff's mill; which interest, at common law, could only pass by grant under seal, being an incorporeal hereditament, and which, at all events, would be determinable at the will of the grantor, since the statute of frauds, as being "an interest in, to, or out of lands, tenements, and hereditaments."

If it were necessary to hold, that a right or interest in any part of the water, which before flowed to the plaintiff's mill, must be shewn to have passed from the plaintiff's father to the defendants under the licence, in order to justify the continuance of the weir in its original state, the difficulty above suggested would undoubtedly follow; for, it cannot be denied, that the right to the flow of the water, formerly belonging to the owner of the plaintiff's mill, could only pass by grant, as an incorporeal hereditament, and not by a parol licence. But we think the operation and effect of the licence, after it has been completely executed by the defendants, is sufficient, without holding it to convey any interest in the water, to relieve them from the burthen of restoring to its former state what has been done under the licence, although such licence is countermanded: and, consequently, that they are not liable to an action as wrongdoers, for persisting in such refusal.

The parol licence, as it is stated in the award of the arbitrator, was a licence to cut down and lower the bank, and to erect the weir. Strictly speaking, if the licence

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was to be confined to those terms, it was at once unnecessary and inoperative; for the soil being the property of the defendants, they would have the right to do both those acts without the consent of the owner of the lower mill. But as the diversion of part of the water which before flowed to that mill would be the necessary consequence of such acts, it must be taken, that the object and effect of such licence was to give consent, on the part of the plaintiff's father, to the diverting of the water by means of those alterations. We do not, however, consider the object, and still less the effect, of the parol licence, to be the transferring from the plaintiff's father to the defendants any right or interest whatever in the water which was before accustomed to flow to the lower mill, but simply to be an acknowledgment, on the part of the plaintiff's father, that he wanted such water no longer for the purposes of his mill; and that he gave back again and yielded up, so far as he was concerned, that quantity of water which found its way over the weir or fletcher, which he then consented should be erected by the defendants. And we think, after he has once clearly signified such relinquishment, whether by words or acts, and suffered other persons to act upon the faith of such relinquishment, and to incur expense in doing the very act to which his consent was given, it is too late then to retract such consent, or to throw on those other persons the burthen of restoring matters to their former state and condition.

Water flowing in a stream, it is well settled, by the law of England, is *publici juris*. By the Roman law, running water, light, and air, were considered as some of those things which had the name of *res communes*, and which were defined, "things, the property of which belong to no person, but the use to all." And, by the law of England, the person who first appropriates any part of the water flowing through his land to his own use, has the right to the use of so much as he thus appropriates, against any

other. *Benley v. Shaw* (a). And it seems consistent with the same principle, that the water, after it has been so made subservient to private uses by appropriation, should again become *publici juris* by the mere act of relinquishment. There is nothing unreasonable in holding that a right which is gained by occupancy should be lost by abandonment. Suppose a person who formerly had a mill upon a stream, should pull it down, and remove the works, with the intention never to return: could it be held that the owner of other land adjoining the stream might not erect a mill and employ the water so relinquished: or that he could be compellable to pull down his mill, if the former mill owner should afterwards change his determination, and wish to rebuild his own? In such a case, it would undoubtedly be a subject of inquiry by a Jury, whether he had completely abandoned the use of the stream, or had left it for a temporary purpose only; but, that question being once determined, there seems no ground to contend that an action would be maintainable against the person who erected the new mill, for not pulling it down again after notice. And if, instead of his intention remaining uncertain upon the acts which he had done, the former proprietor had openly and expressly declared his intention to abandon the stream, that is, if he had licensed the other party to erect a mill, the same inference must follow with greater certainty. Or, suppose *A.* authorizes *B.*, by express licence, to build a house on *B.*'s own land, close adjoining to some of the windows of *A.*'s house, so as to intercept part of the light; could he afterwards compel *B.* to pull the house down again, simply by giving notice that he countermanded the licence? Still further, this is not a licence to do acts which consist in repetition, as, to walk in a park, to use a carriage way, to fish in the waters of another, or the like: which licence

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(a) 6 East, 208.

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if countermanded, the party is but in the same situation as he was before it was granted: but this is a licence to construct a work, which is attended with expense to the party using the licence; so that, after the same is countermanded, the party to whom it was granted may sustain a heavy loss. It is a licence to do something, that in its own nature seems intended to be permanent and continuing; and it was the fault of the party himself, if he meant to reserve the power of revoking such licence, after it was carried into effect, that he did not expressly reserve that right when he granted the licence, or limit it as to duration. Indeed, the person who authorizes the weir to be erected, becomes, in some sense, a party to the actual erection of it; and cannot afterwards complain of the result of an act which he himself contributed to effect.

Upon principle, therefore, we think the licence, in the present case, after it was executed, was not countermandable by the person who gave it; and, consequently, that the present action cannot be maintained. And, upon authority, this case appears to be already decided by that of *Winter v. Brockwell* (a), which rests on the judgment in *Web v. Paternoster* (b). We see no reason to doubt the authority of that case, confirmed, as it has since been, by the case of *Tayler v. Waters* (c) in this Court, and recognised as law in the judgment of Mr. Justice Bayley in the case of *Hewlings v. Shippam*, in the Court of King's Bench.

We therefore think the rule for setting aside the award of the arbitrator must be made—

Absolute.

(a) 8 East, 308.

(b) Palmer, 71.

(c) 7 Taunt. 383; S. C. 2 Marsh.
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PERKINS v. PLYMPTON.

Saturday,
June 11th.

THE facts of this case, and the objections taken to a verdict which passed for the plaintiff, are so fully and accurately given by the Lord Chief Justice in delivering the judgment of the Court, that it is only necessary to state that it was an action of trespass for breaking and entering the plaintiff's house, and seizing his goods, and converting them to the defendant's own use; that the cause was tried before Mr. Baron *Vaughan* at the last Assizes at *Northampton*, when the Jury found a verdict for the plaintiff, damages 20*l.*, leave being reserved to the defendant to move the Court to set aside the verdict and enter a nonsuit, on the grounds, that the action should have been brought against the Sheriff, and that the plaintiff had no right of action against the defendant, as he was precluded from suing him by a rule of the Court of *King's Bench*.

Mr. Serjeant *Adams* having in the last term obtained a rule *nisi* accordingly—

Mr. Serjeant *Goulburn*, on a former day in this term, shewed cause; when the Court took time to consider.

Lord Chief Justice TINDAL now delivered the judgment of the Court, as follows:—

This is an action of trespass, to which the defendant, in his third plea (which raises the point immediately before the Court) pleads in bar a judgment recovered by him against the present plaintiff; the issuing of two writs thereon, under which a partial levy had been made; that a *testatum fieri facias* issued, returnable on *Tuesday*, the

In an action of trespass for seizing the plaintiff's goods, the defendant justified under an execution. After seizure, but before the sale by the Sheriff, the execution was set aside by a rule of the Court of *King's Bench*, on the terms of the then defendant undertaking not to bring any action on account of such seizure. The rule for setting aside the execution was served on the plaintiff in the cause, and also upon the undersheriff by the then defendant's attorney; notwithstanding which he proceeded to sell, alleging, that, as he had not received any instructions from the attorney of the plaintiff in the cause, he was not warranted in staying proceedings:—*Held*, however, that as the execution was illegally sued out, the plaintiff in the cause was a wrongdoer, and that having set the Sheriff in

executing such motion by a writ illegally issued, he was answerable for the acts of the Sheriff in executing such writ, and, consequently, that he was liable in trespass brought by the defendant in the cause, for seizing and selling his goods under the execution.

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18th *January*, 1830, indorsed to levy 25*l.* 9*s.*, with poundage, &c., being the residue of the damages recovered on the judgment; and that this writ was delivered to the Sheriff on the 15th *January*, 1830, who entered and seized the goods of the present plaintiff. The plea then alleges, that such proceedings were had in the Court of *King's Bench*, that, on the 22nd *January*, 1831, it was ordered, by a rule of that Court, that the last-mentioned execution should be set aside without costs, the defendant in that cause (that is, the present plaintiff) undertaking not to bring any action on account of the said seizure.

The replication to this plea alleges, that the seizure in the said rule mentioned, and the seizure in the introductory part of the third plea mentioned, are other and different, upon which issue is joined; and the plaintiff having also new assigned to the second plea, that he brought his action for another and different trespass than that justified in the second plea, the defendant pleads not guilty to such new assignment.

The real question, therefore, raised between the parties on these pleadings, is, whether there has been any seizure by the Sheriff subsequent to that which was covered by the rule; and, if so, whether the defendant (the plaintiff in the former action) is responsible for that seizure.

At the trial, two writs were proved, one sued out on the 24th *December*, 1830, to levy 46*l.* 10*s.*, returnable the 11th *January*, reciting a previous *fiery facias*; and another sued out on the 10th *January*, 1831, to levy 25*l.* 9*s.*, returnable the 28th *January*. The Sheriff took and kept possession under these writs. It appeared that the rule *nisi* for setting aside the execution, which was granted by the Court of *King's Bench* on *Saturday*, the 15th *January*, was served on the present defendant (the plaintiff in the former cause) on the evening of the same day, in *London*, after the time for putting letters in the post; that, on the morning of the 18th, which was *Tuesday*, the un-

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der-sheriff at *Northampton* was served with the rule by the attorney for the present plaintiff; that the latter and his attorney then remonstrated with the under-sheriff against his going on with the sale; notwithstanding which, he proceeded to sell on the 18th, alleging, that, as he had not received any instructions from the attorney of the plaintiff in the cause (the present defendant), he was not warranted in staying proceedings. A verdict was found for the plaintiff, subject to the opinion of the Court on these facts. It has been insisted, that, under the circumstances above stated, the plaintiff ought to have been non-suited—*first*, because the present defendant was not responsible for the conduct of the Sheriff in proceeding to sell after the rule for staying proceedings had been served upon the Sheriff—and *secondly*, because the rule of the Court of *King's Bench*, by which the execution was set aside, had restrained the present plaintiff from bringing any action for the seizure. But we are of opinion that the plaintiff is entitled to retain his verdict. It is admitted by the pleadings that the execution has been set aside. The present defendant, therefore, cannot justify his acts, as plaintiff in the former cause, under proceedings which must now be taken to be null and void. In suing out his execution originally, he must be considered as a wrong doer; and, having set the Sheriff in motion by a writ illegally issued, he must answer for the acts of the Sheriff in executing such writ, unless something can be shewn to distinguish his case from that of any other plaintiff who delivers a writ to the Sheriff to be executed, without lawful authority. It is contended, that, as the Sheriff had been served with the rule for staying the proceedings by the present plaintiff, it was not incumbent on the present defendant to take any further step to prevent the sale: but it is to be recollected, that the seizure must now be taken to have been originally wrongful; and the ineffectual act of the plaintiff in endeavouring to prevent the Sheriff from pro-

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ceeding, by communicating to him the rule of Court for staying the proceedings, cannot absolve the defendant from that liability to which he would have been subject if the present plaintiff had not interfered.

But it is insisted, that the plaintiff is restrained by the undertaking contained in the rule of the Court of *King's Bench*, from bringing an action for the seizure. It is unnecessary to inquire what the effect of that undertaking might be as a legal defence in this Court, if it had applied to the subject of the present action:—for it appears to us, that the sale which took place on the 18th *January* by the Sheriff, is a separate and distinct trespass from the original taking, and that the undertaking mentioned in the rule of the 22nd *January*, does not embrace such subsequent sale. The rule *nisi* for setting aside the execution was granted on the 15th, and the language of the rule made on the 22nd, by which the rule *nisi* was made absolute, must be taken to refer to matters which occurred previously to the 15th, and to which the rule of the 15th applied. It cannot, therefore, be supposed to embrace the sale of the 18th, which took place, as alleged in the new assignment, after the making of the rule relied upon in the second plea, and is a different seizure from that mentioned in the rule of the 22nd *January*, as alleged in the replication to the third plea.

For these reasons, we think that the rule ought to be—

Discharged.

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BURLS v. SMITH.

*Saturday,
June 11th.*

THIS was an action of *assumpsit* for goods sold and delivered. At the trial, before Lord Chief Justice *Tindal*, at *Westminster*, at the Sittings after last *Hilary* Term, the plaintiff, a baker, proved, that, in the year 1829, he supplied bread to the *Royal Western Hospital*, to the amount of 52*l.* 11*s.* It appeared that the hospital was supported by voluntary contributions; that the affairs were conducted by a committee, appointed by the subscribers at large. That the defendant was a subscriber, and a member of the committee, he having been appointed on the 21st *January*, 1829; that he frequently attended their meetings, which were held once a-month, for the purpose of examining and auditing the accounts, and managing the affairs and concerns of the establishment; that the committee-men usually signed cheques, which were drawn by the secretary, for the payment of the different tradesmen's bills; and that they also ordered the necessary provisions for the inmates of the hospital; that the committee kept a book, containing minutes of their proceedings, which was produced in evidence, and from which it appeared, that, at a meeting on the 21st *November*, 1829, at which the defendant was present, the steward of the hospital produced his balance sheet, on which was inserted, among other tradesmen's names, that of the plaintiff, and the amount of his demand for bread; and it was ascertained, that, if a contribution or subscription were made of 150*l.*, it would be sufficient to pay all the debts due to those tradesmen; upon which the defendant subscribed ten guineas; and that, at a meeting on the 28th *November* following, he took the chair. The nurse of the hospital proved that the plaintiff had supplied the bread, and had sent in his bills weekly, the amount of which she

A subscriber and member of a committee of a charitable institution, who attends their meetings for the purpose of managing the affairs of the establishment, is liable to a tradesman for necessities supplied to such charity, and the proper question for the consideration of the jury is, whether the defendant had so acted as to induce the plaintiff to believe that he was to look to the defendant and the other members of the committee for payment.

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entered in a book kept for that purpose; but it did not appear who had appointed the plaintiff to be the baker to the hospital, or who had originally given him the order to supply the bread; but he put in a pass-book, at the commencement of which he had debited a person of the name of *Sleigh*, who had formed the establishment at the beginning of the year 1829, but who shortly afterwards gave up all his interest in it to the subscribers at large.

Under these circumstances, the Lord Chief Justice left it to the Jury to say, whether the defendant had acted in such a manner as to induce the plaintiff to believe that he was to look to him and the other committee-men for payment of his demand; and he also told the Jury, that it was not necessary that the defendant should be present at every meeting, but that, if he held himself out to the plaintiff by his conduct as directing the affairs of the hospital, it was sufficient: upon which the Jury found a verdict for the plaintiff, for the full amount of his demand.

Mr. Serjeant *Spankie*, in the last term, obtained a rule *nisi*, that this verdict might be set aside and a new trial granted, on the grounds, that the defendant, as a mere subscriber and member of a committee of a charitable institution, was not personally liable for the expenses of the establishment; that there was no evidence to go to the Jury that the plaintiff gave credit to the defendant, or to the members of the committee, particularly, as his own pass-book shewed that he gave credit to Mr. *Sleigh* in the first instance; and it did not appear when he commenced giving credit to the committee, if he ever did. There was no express authority given by the defendant to the plaintiff to supply the hospital with bread; and there was no association or meeting for mercantile purposes, neither can a charitable institution be classed with a commercial establishment. The subscribers and contributors never expected to derive any profit from the establishment; and

the defendant merely attended the meetings of the committee to ascertain how the sums subscribed, and other donations, were disposed of; and the tradesmen who sent in the supplies must have known that they were furnished to the charity:—the committee-men can, at all events, be only liable to the amount of the sum they had in hand; and it appeared, that, at the meeting on the 21st November, 150*l.* was required to pay the different tradesmen their demands on the hospital at that time; and in *Delaney v. Strickland* (a), where plate was ordered by the defendant, a member of the *General Service Club*, for the use of the society, it was held, that every member who either concurred in the order, or subsequently assented to it, was liable, although the member who ordered the plate was made the debtor in the plaintiff's books, and the bill was sent to him, unless it clearly appeared that the plaintiff meant to give credit to the defendant only. Here, the object of the charity was to keep the institution on foot by voluntary contributions, which ought not to be applied to the payment of the tradesmen's bills. The committee merely met for the management and direction of the funds in hand; and, it was incumbent on the plaintiff to shew who gave him the order to supply the hospital in the first instance, or that he had some authority from the defendant to look to him for payment.

Mr. Serjeant *Jones* afterwards shewed cause.—The verdict which has been found for the plaintiff will not endanger or impede persons from contributing to public charities, as the hospital in question was not in fact a charitable institution only, for several persons expected to derive pecuniary advantages from it, namely, the medical men, and those who were appointed lecturers; and the whole establishment was a mere matter of speculation. It was

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(a) 2 Stark. Rep. 416.

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properly left to the Jury to say, whether they might not infer that the defendant had acted in such a manner as to induce the plaintiff to believe that he was to look to him for payment. The defendant was not only a subscriber and contributor, but a member of the committee, who had the control, management, and disposition of all the funds received on account of the hospital; and the defendant, by generally attending the meetings of the committee, and occasionally presiding, held himself out as one of those persons who had the management and disposal of the funds. Besides, it appeared that the committee superintended the financial affairs of the establishment; they alone had the control of all the funds, they also examined the balance sheets, and gave the orders for the necessary supplies; and, as they appeared to exercise the sole command over the funds, and ordered the supplies, it is a sufficient assumption of authority, from which the Jury might infer that the committee-men held themselves out as being responsible for the amount of the supplies so ordered and furnished. A member of the committee cannot be assimilated to a subscriber or contributor to a public charity, whose liability does not arise on the mere fact of sending his subscription; but, the nature of the undertaking, and the duties the members of the committee undertook to perform, must be looked at. In *Delauney v. Strickland*, the defendant was held to be liable to a tradesman, who had supplied the club with plate, although it was ordered by him for the use of the society, and had been used by the other members. In *Cullen v. The Duke of Queensberry* (a), a bill was filed by the plaintiff against the Duke of *Queensberry*, Earl of *Egremont*, Lords *Melburne*, *Macartney*, and *Lucan*, being the annual committee (at the time of the transaction) of the Ladies' Club, for money expended in the purchase of an house, furnishing and attending it, and other

(a) 1 Brown's Chan. Cas. 101.

incidental expenses. At a meeting at Lord *Melburne's*, in *March*, 1775, at which about one hundred members were present, they contracted with the plaintiff for the business to be done, which was the subject of the suit. The defendants, except Lord *Macartney*, in *April*, 1775, subscribed an agreement with the plaintiff. Afterwards, some part of the plan being varied, Lord *Melburne*, Lord *Lucan*, and Lord *Macartney*, on behalf of themselves and the other subscribers, gave a letter of attorney to the plaintiff to act for them, dated the 1st *May*, 1775. The defendants insisted that they were not personally liable to the plaintiff's demand; that all that was done was on account of the club; and that sixty persons who had subscribed 4,000*l.* to purchase the equity of redemption of the house, should all be made parties. The case stood over, the Lord Chancellor intimating an opinion against the defendants; and the objection was afterwards overruled, and the plaintiff had a decree in his favour; against which, the defendants appealed to the *House of Lords*, where, after a hearing of three days, the decree was affirmed; and, among other authorities, *Horsley v. Bell* (a) was referred to for the plaintiff, where the Lord Chancellor, considering it a new and important case, was assisted by Mr. Justice *Gould* and Mr. Justice *Ashhurst*. There, a bill was filed by the plaintiff, the undertaker of a navigation at *Thirsk*, in *Yorkshire*, against the commissioners named in the act of Parliament for carrying it on, who had signed the several orders; and the *first* question was, whether the defendants were personally liable, they contending that they were executing a public trust, and that the credit was given to the undertaking itself, not personally to them, and that the remedy was therefore *in rem*—and *secondly*, whether all who had been present at any of the meetings, and had signed some, but not all the

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(a) Chancery, 9th Feb. 1778; 1 Brown's Chan. Cas. 101, n.

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orders, were liable as to all the orders, or only as to those which they had respectively signed; and Mr. Justice *Ashhurst* said (a)—“The principal question is, whether the defendants are liable in their private capacities, or the plaintiff has given credit to the fund. I think the defendants are personally liable. It would be hard that the plaintiff, who has done the work at a reasonable price, without any extraordinary profit, should have no remedy. If he has not, the commissioners, by appointing a clerk to act for them, might deprive every particular labourer of any remedy, except against the fund, which would be absurd.” And Mr. Justice *Gould* concurred, and said, “the law raises an *assumpsit* to those who have done the meritorious act. Then there is not so much difficulty as novelty, in this case. It is like a partnership; they who at any time have acted, have undertaken a partnership. I should have been of opinion, that an action at law would have lain against any one of them, and that he must have sought his remedy against the others. Those who came in at any subsequent time affirm the former acts. It is *ratihabitio*, and *omnis ratihabitio retrahitur et mandato sive licentie equiparatur*.” And the Lord Chancellor said—“The first question is, whether the plaintiff’s demand is singly *in rem*, or the commissioners have rendered themselves personally liable. Upon whose credit must the contract be? Certainly, that of the commissioners who act. It is their fault if they enter into contracts, when they have not money to answer them. They have made themselves liable by their own acts.” So, here, the defendants and the acting members of the committee have made themselves liable by their own acts, particularly, as they exercised the sole control over the funds and finances of the institution. In *Eaton v. Bell* (b), where an inclosure act empowered the

(a) 1 Brown’s Chan. Cas. 101, n.

(b) 5 Barn. & Ald. 34.

commissioners to make a rate to defray the expenses of passing and executing the act; and enacted, that persons advancing money should be repaid out of the first money raised by the commissioners, and expenses were incurred in the execution of the act before any rate was made; and, to defray these expenses, the commissioners drew drafts upon their bankers, requiring them to pay the sums therein mentioned, on account of the public drainage, and to place the same to their account as commissioners; and the bankers, during a period of six years, continued to advance considerable sums by paying these drafts:—it was held, that the commissioners were personally responsible to the bankers for the drafts so made. There, the question left to the Jury was, whether credit was given by the plaintiffs to the defendants personally, or to the fund which they had power to raise; and the Jury found a verdict for the plaintiffs. So, here, it was properly left to the Jury to determine, whether the defendant, as an acting member of the committee, had not conducted himself in such a manner as to induce the plaintiff to believe that he was to look to him and the rest of the committee for the payment of his demand. No objection has been made to the direction of the Lord Chief Justice; and the question was peculiarly within the province of the Jury, and their verdict was warranted by the evidence, and ought not to be disturbed.

Mr. Serjeant *Spankie*, in support of his rule.—There was not sufficient evidence to warrant the Jury to find that the defendant had so acted or held himself out to the plaintiff as to induce the latter to supply the bread on the defendant's credit, or that he was to look to him for payment. The defendant himself never gave any order to the plaintiff, and he derived no pecuniary interest or advantage from the institution. The plaintiff did not even shew

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that he knew that the defendant was one of the committee, neither did he adduce any evidence to prove who gave the order for the bread in the first instance; and yet he sought to recover the balance of a bill delivered at weekly intervals to the nurse of the hospital. A voluntary donation by the defendant in furtherance of an act of charity, ought not to impose upon him a new obligation; and it is quite clear that he was not liable as a subscriber. In *Cullen v. The Duke of Queensberry*, it was merely decided, that the committee of a voluntary society entering into agreements with tradesmen for the whole of the members, it was sufficient to make them parties to a bill in equity; and that it was not necessary to include all the subscribers. Besides, in that case, there was an express contract by one hundred of the members, and some of the defendants afterwards gave a letter of attorney to the plaintiff to act for them, which was an adoption and ratification of the previous contract. In *Baton v. Bell*, the commissioners drew drafts upon their bankers, and desired them to place the same to their account as commissioners, and by the inclosure act they were expressly empowered to raise money to defray the expenses of passing and executing it. Here, however, there was no previous communication between the plaintiff and the defendant; the latter merely acted as one of the committee for the benefit of the charity: and it would be highly injurious to the interests of all religious and charitable institutions, to hold that the members who are selected and act as committeemen should be individually and personally liable for the charges of the establishment. In *Dickinson v. Valpy*, Mr. Justice *J. Parke* said (a)—“In those cases in which a plaintiff has not been induced by the defendant’s representation to give credit to him, but seeks to fix him, be-

(a) 10 Barn. & Cress. 142.

cause he has *really authorised* the contract to be made, the plaintiff must shew that authority; and an authority upon condition not performed is no authority at all." That is the true principle; and here, the plaintiff did not shew that he knew the defendant, or even that he was aware that he was a member of the committee. In *Lanchester v. Tricker* (a), where several parishioners attended at a vestry meeting, and signed resolutions authorizing the churchwardens to repair the tower of the church, and they employed persons for that purpose, it was held that those parishioners who had attended and signed the resolutions at the vestry, acted merely as vestry-men, and affixed their signatures in that character only, without any intention to render themselves individually or personally liable. So, the members forming a committee of a charitable institution are not personally liable, unless they give an order in that character for the supplies of the charity; and here, the defendant never gave any order to the plaintiff to furnish bread, and an order cannot be implied from the mere circumstance of his attending the meetings of the committee. Although, in *Doubleday v. Musket* (b), the directors of a projected public company were held to be responsible for works ordered at a meeting of the projectors, which they did not attend; yet there, the directors held themselves out as such, and the plaintiff dealt with them in that character. Besides, there the meeting was held with a view to the establishment of a trading company, which is altogether distinct from the case of a committee meeting for a charitable purpose; and in this case there was no community of interest, nor could one committee-man bind another; and if the members of the committee be held liable, the subscribers must be equally so, as the committee were selected and appointed by them; and if the defendant be held to be responsible, it will strike a death-blow to the charitable in-

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(a) 8 B. Moore, 20. (b) 7 Bing. 110; S. C. 4 Moore & Payne, 170.

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situations of this metropolis, which are the pride of the country and the admiration of the world.

Cur. adv. vult.

Lord Chief Justice TINDAL now said—We are of opinion that there is no ground for granting a new trial on the point submitted to us on behalf of the defendant; but we are not satisfied, because, on examining the plaintiff's pass-book, we found that several of the leaves had been cut out. We therefore think there should be a new trial, on payment of costs by the defendant; and if he chooses to accept it on these terms, the rule must be made—

Absolute.

Saturday,
June 11th.

HELME v. SMITH.

The plaintiff, as managing owner and ship's husband, expended a certain sum for the outfit of the vessel:—*Held*, that he might sue each of the other part owners separately for his share of the expense. Although the part owner of a vessel can legally claim no other interest than that which appears on the face of the certificate of registry; yet, if he holds himself out as having a larger interest, he is responsible to that extent.

THIS was an action by the plaintiff, as ship's husband and part owner of the ship *Brailsford* against the defendant, another part owner of the same ship, to recover the portion of the balance alleged to be due to the plaintiff as such ship's husband or managing owner, for the outfit of the ship for four different voyages.

The cause came on for trial before Lord Chief Justice Tindal, at Guildhall, at the Sittings after the last Hilary Term, when a verdict was taken for the plaintiff for 1000*l.*, subject to a reference, by an order of *Nisi Prius*, of all matters in difference between the parties, to an arbitrator, who found the following facts, which he stated in his award:—*namely*, that the plaintiff was part owner of the ship *Brailsford*, and acted as ship's husband thereof, during the several voyages in respect of which the claim in this action was made; that the defendant was also owner of one fourth of the ship, and interested to the extent of

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one fourth in all the said voyages; and that the dealings between the plaintiff and defendant, in respect of which this action was brought, were upon the footing of the defendant's being owner of one fourth part, and interested as aforesaid. The arbitrator then awarded and adjudged that the plaintiff do recover against the defendant in the action the sum of 462*l.* 8*s.* 6*d.*, being the balance due at the time of the commencement of the suit from the defendant, as such owner of one fourth part of the ship *Brailsford*, to the plaintiff, as such part owner thereof, for the share of the defendant of the expenses incurred and paid by the plaintiff as managing owner or ship's husband as aforesaid, for the benefit of the said ship, for four several voyages, being the voyages aforesaid, while the defendant was such part owner, and interested as aforesaid.

No account having been stated or settled between the parties, and no express contract to account having been proved before the arbitrator, but all the voyages having been concluded, and the ship sold as thereafter mentioned, before this action was brought:—if the Court should be of opinion that an action was not maintainable by one part owner against another, for the cause and under the circumstances aforesaid, then the arbitrator awarded that the verdict for the plaintiff should be set aside, and a nonsuit entered in lieu thereof.

The award then went on to state, that it having been satisfactorily proved, in point of fact, that the defendant, during the time of the incurring of the expenses aforesaid, was owner of one fourth part of the said vessel, and liable to contribute to the same accordingly:—the arbitrator further found, that one *John Smith*, a *British* subject, was owner of the said ship *Brailsford*, which ship was *British* built, and was duly registered at *Hull* on the 24th *April*, 1811; that *Smith*, on the 15th *June*, 1811, sold one eighth share of the ship to the defendant, and certain other shares to other persons; that entries were made of such sales on the certificate of registry, and that

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it did not appear by the register, or certificate of registry, that the defendant ever acquired or had any greater share in the said ship than the one eighth aforesaid, nor had it been made to appear that the defendant acquired any further share or interest therein in any representative character, or as devisee, or by operation of law; that the ship was sold by the consent of the plaintiff and defendant, among others, on or about the 16th *August*, 1824, and that the proceeds of the sale were allowed by the plaintiff against the expenses of the adventure; and that an entry was made on the certificate of registry to the following effect:—

“*Custom House, Hull, 11th January, 1825, Hannah Smith, Joseph Peter Smith (the defendant), Robert Helme (the plaintiff), together with Edward Scoresby Cox, Thomas Cox, and John Stuart, executors of John Smith, have transferred, by bill of sale, dated 16th August, 1824, sixty four shares to Thomas Pope of Plymouth, in the county of Devon, merchant.*”—And the proceeds of such sale were paid to the plaintiff on account of his disbursements in respect of such ship, and by him allowed in account.

If the Court should be of opinion, that, under the above circumstances, such entries were conclusive evidence of the amount of interest in the said ship possessed by the defendant, at any time between the two periods—then that the verdict for the plaintiff should be entered for the sum of 231*l.* 4*s.* 3*d.*, and no more, and that the plaintiff should recover that sum in the action.

Mr. Serjeant *Wilde*, on a former day in this term, obtained a rule *nisi* to enter up judgment for the plaintiff for 462*l.* 8*s.* 6*d.*, pursuant to the first clause of the award.

Mr. Serjeant *Jones* now shewed cause.—*First*, no ac-

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tion was maintainable by the plaintiff against the defendant for the expenses of the outfit of the ship for the several voyages in respect of which the plaintiff claimed to recover, as he and the defendant were partners in all transactions relating to the ship; and, in *Bovill v. Hammond* (a), where two persons jointly undertook to procure a cargo for a vessel, for certain commission, which they agreed to divide equally between themselves, and one of them received on account of such commission a certain sum of money;—it was held, that the other could not maintain an action for money had and received for a moiety; as the demand arose out of a partnership transaction, and no account had been settled between them: and Lord Chief Justice *Abbott* said—“ It is a general rule, that, between partners, whether they are so in general, or for a particular transaction only, no account can be taken at law;” and here, the arbitrator has found that no account was stated or settled between the parties, no express contract to account having been proved before him; and he concluded his award by stating that the proceeds of the sale were paid to the plaintiff on account of his disbursements in respect of the ship, and by him allowed in account. The plaintiff’s remedy, therefore, is in equity, particularly, as the arbitrator has found that the dealing between the plaintiff and defendant, in respect of which the action was brought, was upon the footing of the defendant being owner of one fourth of the ship, and interested to that extent in all the voyages to which the expenses of the outfit applied. The reasonable construction to be put on the first part of the arbitrator’s finding is, that there were dealings between the plaintiff and defendant as debtor and creditor, and that the sum of 462*l.* 8*s.* 6*d.* was the balance of such dealings; but it does not appear that such balance had been previously struck, or that the defendant had ever promised to pay the amount.

(a) 6 Barn. & Cress. 149.

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Although it may be admitted that part-owners of a vessel are not partners as far as regards the ship itself, yet they may be so as to a particular transaction, namely, as to the expenses of the outfit; and here, as the ship was sold on the joint account of the plaintiff and defendant and the several other part-owners, and the proceeds of the sale were allowed by the plaintiff against, and paid to him on account of the expenses of the adventure and the disbursements in respect of the ship, there was a communion of profit and loss, which clearly constituted a partnership, as far as regarded the disbursements for the outfit. Although, in *Ex parte Christie* (a), where part owners of a ship sought to set off their proportions of a debt due to the master, who had become bankrupt, against the debts due by him to them severally, and the question was, whether part-owners of a ship are so distinct that they may be considered separate creditors, the Lord Chancellor (*Eldon*) said—"Unless it could be made out that part-owners of a ship are not partners, this was nothing more than a set-off of a separate debt against a joint debt." Although, therefore, part-owners may be considered as tenants in common as far as regards the ship, yet they are partners in all transactions growing out of the particular adventure or expenses attending it. In *Strelly v. Winson* (b), where one of three part-owners refused to fit out the ship to sea, and the others did it without his consent, and she was lost in the course of the voyage; it was decreed that the loss should be equally borne by all three, on the ground, that, although one of the partners did not consent to the fitting out of the ship, yet as he would have been entitled to one-third of the profits, he ought to bear his proportion of the loss. In *Holderness v. Shackels* (c), where several persons were part-owners of a ship engaged in the whale fishery, and one of them became bankrupt;—in an action of

(a) 10 Ves. 105.

(b) 1 Vern. 297.

(c) 8 Barn. & Cress. 612; S. C.
3 Man. & Ryl. 25.

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trover by his assignees, against another part-owner, for his share of the proceeds of the adventure, it was held, that the other part-owners had originally a lien upon it for the bankrupt's share of the disbursements of the ship; and Lord *Tenterden* said (a):—This is a claim, by persons being part-owners of a ship, engaged together in an adventure; and the subject matter, in respect of which this action is brought, is part of the proceeds of that adventure. Now, it is clearly established as a general principle of law, that if one partner become a bankrupt, his assignees can obtain no share of the partnership effects, until they first satisfy all that is due to him from the partnership." Applying that principle to the present case, it is equally clear that one part-owner, or a person jointly interested as a partner in a ship, cannot maintain an action against another part-owner, until there has been a balance struck, and a promise to pay the amount of such balance.

But, *secondly*, if the plaintiff and defendant are not partners, the action can only be maintained against the latter as the owner of one-eighth share of the vessel, for the arbitrator has found that it does not appear by the register or certificate of registry that he ever acquired or had any greater share in the ship. By the registry act, two things are necessary to convey a property in ships—*first*, a bill of sale reciting the certificate of registry and—*secondly*, an entry of the sale on the register; and here, there is no agreement or contract, either express or implied, to render the defendant liable to a greater extent than his eighth share, although, in point of fact, he might be the owner of one fourth. It is a well known principle, that an implied contract can only arise from a legal liability. In *Brewster v. Clarke* (b), it was held that an agreement for the sale of a ship was void under the registry acts, 26 *Geo. 3*, c. 60, and 34 *Geo. 3*, c. 68, for want of the certifi-

(a) § Barn. & Cress. 618.

(b) 2 Meriv. 75.

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cate of registry being duly recited in the memorandum of sale, although a copy of such certificate was thereto annexed; and that the policy of these acts prevents a Court either of law or equity from looking on a person who has not strictly complied with the provisions of such acts, in the light of a purchaser. In *Rolleston v. Hibert* (a), it was determined, that an absolute bill of sale of a ship then at sea was void by the statute 26 Geo. 3, c. 60, s. 17, unless the certificate of the registry were duly recited therein, although the vendee gave at the same time an undertaking to restore the ship on a future day, on payment of a certain sum advanced by him on the credit of the security of the ship; and the cases of *Camden v. Anderson* (b) and *Ex parte Yallop* (c) have established the principle, that a part-owner, being a proprietor, must be registered as such, as well as the share or interest he has in the vessel; that, unless he be so registered, he can have no title to the ship or her earnings; and that if he brings an action, or files a bill in equity for accounts and profits, it will be a sufficient answer on the part of the defendant, that the name or interest of the part-owner is not included in the ship's register.

Mr. Serjeant *Wilde*, in support of the rule, was desired by the Court to confine his argument to the first point only.—It appears by the award, that the plaintiff, as ship's husband or managing owner, had expended a certain sum in the outfit of the ship; he, therefore, is entitled to recover for the expenses of such outfit, from each of the part-owners, according to their share or interest in the vessel. It is immaterial whether the plaintiff were a part-owner or not, and he is not bound to resort to a Court of equity to recover the expenses of the outfit, as they are in the nature of a separate undertaking, and wholly inde-

(a) 3 Term Rep. 406. (b) 5 Term Rep. 709. (c) 15 Ves. 60.

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pendent of the profits of the adventure in which the ship might be employed. If four persons are joint owners of a house, and one puts it in repair, there can be no doubt but that he might call on the others for contribution, and sue them at law for their share of the expenses incurred in such repairs. But it is quite clear that part-owners of a ship cannot be considered as standing in the situation of partners. They are not joint tenants, but tenants in common. In the *first* place, there is no *jus accrescendi*, or right of survivorship; and *secondly*, they have no specific lien upon the common property of the ship in respect to advances made by them for her use, or for balances due to them from other part-owners on account of the vessel; and the case of *Ex parte Young* (a) is an express authority to shew, that part-owners of a ship are tenants in common, and, as such, each has a proportion of the vessel according to his *quota* of the capital concerned, or of the whole purchase, and each must contribute according to the sums expended in her outfit. In *Ex parte Christie*, all the part-owners employed one master as their common servant; here, however, the plaintiff, as managing owner, made the disbursements on account of the respective part-owners; and as the arbitrator has found that the defendant was owner of one-fourth of the ship, the plaintiff is entitled to enter up judgment for 462*l.* 8*s.* 6*d.*, being the amount of the balance found to be due to him from the defendant as such part-owner.

Lord Chief Justice TINDAL.—This was a rule calling on the defendant to shew cause why judgment should not be entered up for the plaintiff for 462*l.* 8*s.* 6*d.*, pursuant to the award of an arbitrator, who has stated certain facts on his award for the opinion of the Court. Two questions arise on the face of the award—*first*, whether an action can be

(a) 2 Ves. & Beam. 242.

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maintained by one part-owner of a ship against another, for his share or proportion of the expenses of the outfit of the vessel; and *secondly*, whether, according to the entry made on the certificate of registry, the defendant, being in point of fact owner of a fourth part of the ship, is liable to contribute to the expenses of the outfit in that proportion, although he is legally entitled to only one-eighth? There seems to me to be no ground for depriving the plaintiff of the full benefit of the award. If, indeed, the plaintiff and defendant were partners, there would be an end of the question; but part-owners of a ship are not necessarily partners; and it has been expressly decided, that they are only tenants in common, and that each has a proportion of the ship according to his share or interest. If, however, one of several part-owners lay out a sum of money on a speculation in goods to be sent abroad, and charges the others according to their several proportions, and it is agreed that the proceeds should be divided between them on the return of the ship, it is quite clear that they would be partners as far as regards the subject of the voyage; but here, the arbitrator has only found the dry fact, that the parties were part-owners. The question then is, whether, if one of several part-owners lay out money in the outfit of the ship, to enable her to proceed on her voyage, he may not sue each of the others for his share or proportion of the expenses so incurred. It would be most unreasonable that he should be compelled to wait till the voyage is determined, for perhaps the ship might never return. Besides, there is nothing to shew that the plaintiff's claim for the outfit was to depend on the profits to be derived from the voyage, or that he was to be deprived of the proportions of the disbursements made for the other part-owners, if the voyage should turn out to be unproductive or unprofitable. Again, the outfit must be considered as a proportion of the capital which each has to advance; and if the plaintiff had advanced for either of the other part-owners the sum he ought to have

contributed, it is clear that it would form the ground of a separate claim; but, if it had been a joint speculation, the case would be altogether different. So, much may depend on the intention of the parties; or it might have been otherwise, if, by the course of trade, it were the custom for the ship's husband to wait for the payment of the disbursements made by him until the return of the ship; but no such custom is stated on the award, but merely the fact that the plaintiff and defendant were part-owners: the former, therefore, as such, is not debarred from maintaining an action at law against the defendant to recover his proportion of the balance due to the plaintiff for the outfit of the ship. With respect to the second question, I am of opinion that there is no legal ground for saying that the defendant is only liable as the owner of an eighth share. It is true, that neither at law nor in equity can an owner of a ship acquire any other interest than that which appears on the face of the register or certificate of registry; but here there are no conflicting claims as to the rights of the parties to the vessel; and as the defendant held himself out as being entitled to one fourth, he is consequently liable to third persons, to whom he made such a representation, in that proportion. I therefore think that the rule ought to be made absolute.

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Mr. Justice PARK.—The difficulty has arisen from confounding the character of the parties. The question has been argued for the defendant as if this were a question of strict partnership; but it is not so. The probability is, that the plaintiff, being a monied man, was constituted the ship's husband or managing owner, and, as such, he made divers disbursements for the outfit of the vessel, which includes tackle, provisions, and all things necessary for the prosecution of the voyage; for which, even if he were a partner, he would be entitled to recover contribution from his co-partners. Besides, he might have been the only

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owner resident in *London*, and whether the adventure turned out to be productive or not, he would be entitled to have the money he had laid out in disbursements for the outfit paid back to him according to the proportions or shares each of the part-owners had in the vessel. Even in the case of an ordinary partnership, consisting of five or six persons, if one has money, and advances his share of the capital to each of the others by way of loan, it is quite clear that he would be entitled to sue each separately; and here, the arbitrator has found that the sums laid out by the plaintiff were for the outfit of the ship. We must be bound by the terms of the award, which only states that the plaintiff and the defendant were part-owners; and a ship's husband would be clearly entitled to sue each of the part-owners for advances made by him for the outfit of the vessel if he were not a part-owner: and his being such, does not alter his situation in this respect. As to the second question, it appears to me that there is no ground for the objection.

Mr. Justice GASELEE.—The only difficulty I feel is to ascertain at what time an undertaking of this nature becomes a partnership transaction. No doubt, if one partner advance a sum of money to another for the purchase of a ship, he may recover it back by action, as in *Venning v. Leckie*(a), where the plaintiff having paid the whole price of goods which were to constitute a partnership stock, to which both parties were to contribute equally; it was held that an action lay against the defendant for his moiety of the price of the stock which was to be furnished by him in the first instance, although there might be accounts to be taken between them as partners, upon the subsequent disposal of the joint stock. Here, however, the question is, whether the advances made by one part-owner for disbursements

(a) 13 East, 7.

for the outfit of a ship should form a portion of the general account at the termination of the voyage, or may be claimed at the outset, and before the ship sails? Besides, the arbitrator has found that the defendant is indebted to the plaintiff for expenses incurred and paid by him for the outfit of the ship for four voyages; and if there had been a separate account, it might have been adjusted and settled at the termination of each voyage. Although, therefore, I feel some difficulty on this point, yet no authority has been cited to induce me to differ from the rest of the Court. With respect to the second question, I entertain no doubt whatever, because the defendant held himself out as a part-owner as to one-fourth of the vessel.

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Mr. Justice BOSANQUET.—I am of opinion that the plaintiff is entitled to have judgment entered for him for the larger sum awarded to him by the arbitrator. As ship's husband, he was agent for the other part-owners, and it is immaterial whether he were also a part-owner or not, and a sum is found to be due to him from the defendant for disbursements made for the outfit of the ship. Before the commencement of each of the four voyages, it was the duty of each of the part-owners to contribute his share or proportion of the expenses of such outfit. The plaintiff, as ship's husband, and being also a part-owner, not only brought in his own share, but advanced the shares of the others at their request; that, therefore, constitutes a debt from them to him as their agent, and which he is entitled to recover, independently of the profits of the adventure. The account of the profits of each voyage does not appear on the face of the award, but the arbitrator has stated that the ship was sold, and the proceeds of the sale paid to the plaintiff on account of his disbursements in respect of the ship. Whether the interest in the ship were a partnership concern or not, is immaterial, because, in either case, the proceeds of the sale were properly applied

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in reduction of a debt due from the several part-owners to the plaintiff as ship's husband. With respect to the other objection, namely, that the defendant is only liable as the owner of one eighth share, yet the arbitrator has found that the dealing between him and the plaintiff was upon the footing that the defendant was owner of one-fourth, and, having represented himself as such, it is immaterial whether he were legally interested to that extent or not. This rule, therefore, must be made—

Absolute.

Monday,
June 13th.

BOWDEN v. HORNE.

The plaintiff declared against the defendant in *assumpsit*, as the acceptor of a bill of exchange. The declaration also contained counts for goods sold, work and labour, and the common money counts. The defendant suffered judgment by default, upon which the plaintiff signed interlocutory judgment for want of a plea, and the judgment was entered generally to the whole declaration. The plaintiff afterwards obtained a rule to compute principal

and interest on the bill, and taxed his costs, and signed final judgment accordingly. After taxation, the plaintiff entered a *nolle prosequi*, as follows, namely, that he would not further prosecute his suit as to the promises and undertakings in the second and subsequent counts of the declaration;—therefore, as to such promises, let the defendant be acquitted, &c.:—*Held*, that such entry was in effect a *remittitur*; and that, as the plaintiff had given up the damages after judgment, he was precluded from suing the defendant again for the original cause of action on the common counts.

to which were added the common money counts, and a count on an account stated. The defendant did not take out any order for particulars of the plaintiff's demand, but suffered judgment to go by default. On the 3rd *July*, 1830, the plaintiff caused interlocutory judgment to be signed for want of a plea, and the judgment was entered generally to the whole declaration, *namely*, that the plaintiff ought to recover his damages by reason of the not performing the several promises and undertakings in the declaration mentioned; but because it is unknown, &c. No further proceedings, however, were taken on the judgment till a few days before the commencement of the last *Michaelmas* Term, when, in order to avoid the delay of a writ of inquiry, and apprehending that the defendant would become bankrupt, the plaintiff's attorney obtained a rule to compute principal and interest on the bill of exchange, and, in pursuance of such rule, the plaintiff's costs were taxed on the 9th *November*, 1830, and final judgment signed for 51*l.* 17*s.*, which included only the amount of the bill and interest thereon, together with the costs. The plaintiff, at the time of the taxation, had not entered a *nolle prosequi* to any of the counts contained in the declaration, and the Prothonotary allowed the costs of the whole of the pleadings, amounting, together with the bill and interest, to the above sum of 51*l.* 17*s.* The plaintiff then directed his attorney to commence a second action against the defendant for the balance due for the goods sold, and work and labour, *namely*, 27*l.* 11*s.* 6*d.*, and, on the 18th *November*, a serviceable *capias* was sued out against the defendant accordingly. The defendant afterwards obtained an order for the particulars of the plaintiff's demand, which having been furnished, the defendant's attorney applied by summons to Mr. Justice *Gaselee*, at chambers, to stay all further proceedings in the action on payment of the above sum of 27*l.* 11*s.* 6*d.*, without costs; and on the parties attending before that

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learned Judge, he, after hearing affidavits on both sides, refused to make any order. The plaintiff then declared, in this second action, in *assumpsit*, on the common counts for work and labour, goods sold and delivered, and the common money counts. The defendant pleaded the general issue only.

On the 25th *February* last, the defendant's attorney obtained an order from Mr. Justice *Bosanquet*, at chambers, for the plaintiff to carry in and docket the judgment in the first action; and, on the 4th *March* following, the judgment was entered and docketted accordingly, and the plaintiff then entered upon the record a *nolle prosequi* as to the counts which formed the subject of the declaration in the second action. The entry of the judgment, after setting out the count on the bill of exchange, and those for goods sold, work and labour, the money counts, and the count on an account stated, was as follows:—" And hereupon, as to the second and subsequent counts of the declaration, the plaintiff freely in Court confesses that he will not further prosecute his suit against the defendant, in respect of the promises and undertakings in the said second and subsequent counts of the said declaration, or any of them:—therefore, as to the said promises and undertakings in the said second and subsequent counts of the said declaration, let the defendant be acquitted and go thereof without day, &c. And the defendant, in his proper person, comes and defends the wrong and injury when &c., and says nothing in bar or preclusion of the said action of the plaintiff in the said first count of the said declaration mentioned, whereby the plaintiff remains therein undefended against the defendant, wherefore the plaintiff ought to recover against the defendant, his damages, on occasion of the premises; and the plaintiff prays judgment, and his damages by him sustained, on occasion of the not performing of the said promise and undertaking in the

said first count mentioned, to be adjudged to him; and because it is suggested and proved, and manifestly appears to the Court here, that the plaintiff hath sustained damages on occasion of the not performing of the said last-mentioned promise and undertaking, to the sum of 30*l.* 14*s.* 4*d.*, besides his costs and charges by him about his suit in that behalf expended, therefore it is considered that the plaintiff do recover against the defendant his damages aforesaid, to wit, the said sum of 30*l.* 14*s.* 4*d.*, and also 21*l.* 2*s.* 8*d.* for his costs and charges, by the Court of our said lord the King now here adjudged to the plaintiff, with his assent, which said damages, costs, and charges in the whole amount to 51*l.* 17*s.*; and the defendant in mercy, &c.

At the trial, before Mr. Justice *Park*, at the last Assizes at *Exeter*, the defendant having put in an examined office copy of the judgment, it was contended for him, that this action could not be maintained, the plaintiff having entered a *nolle prosequi* in the former cause, as to the counts which form the subject of the present action. The Jury, however, found a verdict for the plaintiff, damages 27*l.* 11*s.* 6*d.*, leave being reserved to the defendant to move to set aside the verdict and enter a nonsuit, in case the Court should be of opinion that the objection taken at the trial was well founded.

Mr. Serjeant *Stephen*, in the last term, accordingly obtained a rule *nisi*.

Mr. Serjeant *Russell* afterwards shewed cause.—In *Seddon v. Tutop* (a), the plaintiff declared on a promissory note, and for goods sold, but, upon executing a writ of inquiry after judgment by default, he gave no evidence on the count for goods sold, and took his damages for the

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(a) 6 Term Rep. 607.

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amount of the note only; it was held, that the judgment thereupon was no bar to the plaintiff's recovering in a subsequent action for the goods sold. That case was recognised and adopted as an authority by Lord Chief Justice *Best* in *Stafford v. Clarke (a)*, where his Lordship said—"The true distinction is this, that if a plaintiff offer no evidence in the first action, on a particular part of his claim, then a new action may be brought for such part; but if he does offer evidence, and fails, he is prevented from bringing a fresh action, because it would tend to harass and oppress the defendant." So, an award, although under a submission of all matters in difference, will not be conclusive upon any matter which was not inquired into before the arbitrator; and, in *Seddon v. Tutop*, Lord *Kenyon* said—"There were two distinct demands, not in the least blended together, and though the plaintiffs might, in the first action, have proved this demand; owing to inadvertence they did not; and the recovery on the note in that action is no bar to their demand in this, which is for goods." That is precisely in point, and although the plaintiff has entered a *nolle prosequi* on the counts which form the subject of the present declaration, yet it can only be considered as in the nature of a discontinuance, and does not operate as a *retraxit*, or release or discharge of this action, or as an absolute bar to a future action for the same cause. The only question is, whether or not the plaintiff's demand on the defendant has in fact been satisfied. Of that there can be no doubt, and the subject matter of the present suit was not at all inquired into, in the former action. In *Cooper v. Tiffin (b)*, the Court said, "that the case of a *nolle prosequi* could not be distinguished in reason from that of a discontinuance; for that in this, as well as in that, the party might afterwards commence another action for the same cause." That is the true principle, and has been invari-

(a) 9 J. B. Moore, 738.

(b) 3 Term Rep. 511.

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ably acted upon ever since the decision of that case. So, the signing judgment of *nonpros* does not operate as an estoppel, neither is it a bar to a new action; and, in *Young v. Munby* (a) it was decided, that the successor might have separate actions against the executor of the late rector, for dilapidations to different parts of the rectory, as they were different and independent injuries in respect of the different parts, and that the causes were distinct. So, here, the plaintiff had two distinct and separate demands on the defendant, one in respect of the bill, on which alone he recovered, and the other for goods sold, and work and labour done. Although, in the case of *Lord Bagot v. Williams* (b), where it appeared at the trial, that the defendant had received on account of the plaintiff, and as his steward, divers sums of money at different times; and that, on the investigation of the accounts, the plaintiff found that there was due to him a much larger sum than that for which he had declared in an inferior Court, but that he had proceeded for the smaller sum, under the belief that the defendant had no available property beyond that amount, and the defendant in that action suffered judgment by default, and the plaintiff verified for a certain sum:—it was held, that all the sums which the plaintiff knew the defendant had received at the time when he commenced the action in the inferior Court, were to be considered as causes of action, in respect of which he had declared and recovered the judgment; yet there, the plaintiff's agent proved the debt, and fixed the amount, and he was aware of all the claims the plaintiff had on the defendant at the time of the commencement of the action in the inferior Court. There, too, the plaintiff declared in debt for one cause of action only in the inferior Court, whilst here, the plaintiff had two distinct and different causes of action in the first suit.

(a) 4 Mau. & Selw. 183.

(b) 3 Barn. & Cress. 235.

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Mr. Serjeant *Stephen*, in support of his rule.—The recovery by the plaintiff on the bill of exchange, which constituted part of the original cause of action in the first suit, coupled with the renunciation of the causes of action as to the other parts of his demand, is a bar to the present claim; and the *nolle prosequi* as to those counts which form the basis of this suit, is a complete answer to the action, and it would operate with great hardship on the defendant if it were otherwise. In *Seddon v. Tutop*, the plaintiff sued out and executed a writ of inquiry; and, as he was not prepared to prove the delivery of the goods, he took a verdict for the amount of the note, but did not abandon a part of his claim, as in this case, by entering a *nolle prosequi* as to part, *after taking judgment* for the whole. In *Lord Bagot v. Williams*, Mr. Justice *Bayley* said (a)—“The case of *Seddon v. Tutop* is distinguishable from the present. Lord *Bagot*, at the time when the first action was commenced, had a demand on the defendant, not for one specific sum of money, but for different sums of money received by the defendant on his account, from different persons, and at different times. His agent knew that he had claims in respect of all the sums now claimed, except 46*l.*, and, having that knowledge, he formed an opinion that 3,400*l.* was the whole sum which Lord *Bagot* ought to claim; and if he acted upon that opinion, it is much the same thing as if a plaintiff in a cause at *Nisi Prius* having a demand of 60*l.*, consisting of three sums of 20*l.*, which became due to him at different times, consented to take a verdict for 40*l.* If the Jury in such a case, at the suggestion of the plaintiff, reduced the verdict to 40*l.*, he would be bound by it, and could not afterwards bring a second action for the other 20*l.* It seems to me that he is equally bound by his own act in this case, as he would have been by a verdict of a Jury in the other, and that, having chosen to abandon his claim once, he has done it for ever.” So, here, as the plaintiff has elected to

(a) 3 Barn. & Cress. 240.

abandon his claim on the defendant, by entering a *nolle prosequi* on the record as to the counts declared on in this action, it operates as a complete bar, and must be considered as in the nature of a *retraxit*, the entry having been made after judgment. Although in *Beecher's* case (a) it was resolved that a *retraxit* cannot be, unless the plaintiff or defendant be in Court in proper person, for the entry is, *quod querens in propria personâ suâ venit et dicit quod ipse placitum suum predict' ulterius prosequi non vult, sed abinde omnino se retraxit, &c.*; yet it was also resolved (b) that a *retraxit* is a voluntary acknowledgment that the plaintiff hath no cause of action, and therefore he will no farther proceed, &c., and, therefore, it is a bar for ever; and (c) that there are sundry manners of entries of a *retraxit*; and, after enumerating several, where both parties have appeared in Court, the form of entry in one is stated to be, *quod idem querens fatetur se (seu cognovit se) ulterius nolle prosequi versus præd' defendent. &c. de placito præd'.* Though this doctrine has been since questioned, yet, in *Coke Littleton* (d), it is expressly referred to, and recognised as law, and a distinction is there drawn between a nonsuit and a *retraxit*, namely, that the latter is a bar of all other actions of like or inferior nature: *qui semel actionem renunciavit, amplius repetere non potest.* In *Sands v. Brocas*, Mr. Justice Periam said (e)—“A nonsuit is when the plaintiff is demanded and doth not appear; but when he comes into Court, and saith—‘*Quod non vult ulterius prosequi,*’ the same is a *retraxit*.” Although Mr. Serjeant Williams, in a note to the case of *Salmon v. Smith*, says (f)—“The true nature and extent of a *nolle prosequi* in civil cases was not accurately defined and ascertained un-

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(a) 8 Rep 58 a; S. C. Cro. Jac.
211.

(b) 8 Rep. 59 a.

(c) Id. 62.

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(d) Page 139. a.

(e) 2 Leon. 177.

(f) 1 Wms. Saund. 4th edit.
206 a.

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til modern times, and that it is now held to be no bar to a future action for the same cause, except in those cases where, from the nature of the action, judgment and execution against one is a satisfaction of all the damages sustained by the plaintiff; and the case of *Cooper v. Tiffin* (a) is referred to, as establishing that principle; yet it does not appear from the report what the form of action in that case was, and the only question was as to the costs; and all the other authorities to which the learned Serjeant referred were actions of *tort*. Although, in *Turner v. Gallillee* (b), the *Year Book*, 8 Hen. 6. 8. was cited, where a diversity was taken betwixt the plaintiff's coming in person, and saying that he will not sue *ouster*, that is said to be a *retraxit*, and a release; and betwixt his saying that he will not appear, which is but a nonsuit—2 *Edw.* 4. 43 b—*Per tous les Justices*—"If a plaintiff come in and say that he will not sue *ouster*, it is a *retraxit*; and when he will not appear, it is a nonsuit;" yet there is no such passage in the *Year Book*: and the 2 *Edw.* 4, ends with 33 b. Although, in *Noke v. Ingham*, Lord Chief Justice *Lee* said (c)—"A *retraxit* is a total relinquishment of the suit, and has a very different operation from a *nolle prosequi*;" yet it was extrajudicial, as the only question was, whether, in *assumpsit* against two defendants who severed in pleading, if a *nolle prosequi* were entered as to one, it destroyed the plaintiff's right of action as to the other. But if a *nolle prosequi* be not a bar to a future action, when entered to a whole cause, yet it must so operate as to the particular part to which it is entered. Besides, the form of the entry is altogether different where a *nolle prosequi* is entered for the whole, or only as to particular counts of the declaration; in the one case it is, that the plaintiff take nothing by his bill, and that the defendant do go thereof without day: in the other, that, as to the promises in the particular count or counts

(a) 3 Term Rep. 511.

(b) *Hardres*, 153.(c) 1 *Wils.* 90.

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mentioned, that the defendant *be acquitted* and go thereof without day. Again, if the plaintiff enter a *nolle prosequi* as to the whole cause of action, the defendant is entitled to costs under the statute 8 *Eliz.* c. 2; but, when it is entered on particular counts only, the plaintiff is not entitled to costs on such counts; and the case of *Stafford v. Clarke* is an express authority to shew that a former recovery for the same cause of action may be given in evidence in *assumpsit* under the general issue; and that, if it be pleaded, it operates as a bar; but, if not, it is admissible, although not conclusive. The recovery, therefore, in the former action on the bill of exchange, coupled with the entry of the *nolle prosequi* after judgment on the counts now declared upon, operates as a bar to the present action, and the defendant is entitled to enter a nonsuit accordingly.

[Lord Chief Justice *Tindal*.—This case raises a pure question of law, and one of considerable nicety; but it appears to me that the justice of the case would be best answered by the plaintiff accepting the amount of the debt alleged to be due from the defendant, without costs].

Cur. adv. vult.

This proposal not having been acceded to—

Lord Chief Justice TINDAL now delivered the judgment of the Court, as follows:—

This case comes before the Court upon a motion for leave to set aside a verdict for the plaintiff, and to enter a nonsuit, on the ground that the defendant has suffered judgment by default in a former action, brought as well upon a bill of exchange, as upon counts which comprise the same cause of action as the present declaration; after which judgment by default, the plaintiff entered upon the record a *nolle prosequi* as to the counts which form the declaration in the present action.

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It is contended by the plaintiff, that the effect of a *nolle prosequi* differs from that of a *retraxit*, in that the former is no bar to a future action, which the latter is confessedly allowed to be; and, in support of that distinction, the several authorities which are collected in the note of Mr. Serjeant *Williams*, in *Saunders's Reports* (a), are relied upon by the plaintiff. It is important, however, to advert to a distinction between the present case and all those which are referred to in that note. The *nolle prosequi*, in all those cases, is entered by the plaintiff either before or after verdict; but in no one of those cases is a *nolle prosequi* after judgment for the plaintiff. In the present case, the interlocutory judgment was entered generally, to the whole declaration, *namely*, "that the plaintiff ought to recover his damages by reason of the not performing the several promises and undertakings in the declaration mentioned; but, because it is unknown, &c." And the entry of the *nolle prosequi* as to the several counts in the declaration after the first, is this: "that the plaintiff freely in Court confesses that he will not further prosecute his suit as to the promises and undertakings in those counts mentioned: therefore, as to the said promises and undertakings in those counts, let the defendant be acquitted, and go thereof without day, &c."

Now, after the plaintiff has obtained a judgment, this entry comes much more near in form to a *remittitur* after a judgment by default, than to the ordinary entry of a *nolle prosequi*; for, in the case of a *remittitur* of part of the damages, the entry is—"And hereupon the said plaintiff freely here in Court remits to the said defendant all damages sustained by him the said plaintiff, by reason of the not performing the several promises and undertakings in the two last counts of the declaration mentioned; therefore let the defendant be acquitted of such damages so re-

(a) Vol. 1, p. 207.

mitted as aforesaid, and go thereof without day, &c." And as the judgment approaches so nearly in form to a *remittitur*, we think ourselves bound to give it the same effect, which is that of a final giving up of the damages by matter of record. It is put upon the record in the same place as a *remittitur*, viz. after the plaintiff has obtained judgment. In both instances, the nature of his original demand is changed, *quia transit in rem judicatam*. The entry, both in this case and that of a *remittitur*, is expressed in terms equally operative. The reason given in one of the authorities referred to, that a *nolle prosequi* is not final, viz. that the plaintiff pays costs under the statute of *Elizabeth*, and therefore ought not to be deprived of a second action where he has misconceived his first, will not apply to this case, where the *nolle prosequi* goes to part only, and the plaintiff is not liable to the payment of costs of that part. And if the plaintiff had inadvertently entered this *nolle prosequi* in its present form, without foreseeing the effects of it, and had applied to the Court to relieve him from it, no doubt, upon proper terms, he would have been allowed to do so.

At present, it appears to the Court, that, after the plaintiff has obtained a judgment in his favour, and has given up the damages upon the record in such terms as the present, he has precluded himself from suing again for the original cause of action, as upon a simple contract, and that such evidence was admissible under the general issue.

We therefore think the rule for entering a nonsuit should be made—

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By an agreement under seal, the defendant covenanted to serve the plaintiff as an assistant in the business of a surgeon-dentist for five years; and the plaintiff, in consideration of such service, covenanted to pay the defendant a salary of 120*l.* for the first year, and to increase it 50*l.* *per annum* for the four succeeding years, and that it should be lawful for the plaintiff, at any time during the said term of five years, to dismiss the defendant from his service, by giving him three months' previous notice in writing: and the defendant further covenanted not to exercise or practise the profession or business of a surgeon-dentist at or within one hundred miles of the city where the plaintiff resided, whilst he continued to practise there, without the previous consent in writing of the plaintiff, under the penalty of 1000*l.*, to be forfeited and paid by the defendant, and to be recoverable in any of his Majesty's Courts of record as and for liquidated damages:—*Held*, that the agreement was void, it being an unreasonable restraint of trade, and not founded on an adequate consideration. *Quare*, whether the sum of 1000*l.* therein mentioned was a penalty, or liquidated damages?

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THIS was an action of debt, by which the plaintiff sought to recover damages for a breach of covenant by the defendant, contained in articles of agreement under seal, and by which the defendant covenanted (among other things) not to exercise or practise the profession of a surgeon-dentist at or within one hundred miles of the city of *York*, without the previous consent in writing of the plaintiff, under the penalty of 1,000*l.* The first count of the declaration stated, that, theretofore, to wit, on the 17th *April*, 1828, at *York*, by certain articles of agreement then and there made, between the plaintiff, therein described as of the city of *York*, surgeon-dentist, of the one part, and the defendant of the other part (which articles of agreement, sealed with the seal of the defendant, the plaintiff brought into Court), the defendant, for himself, his heirs, executors, and administrators, did covenant, promise, and agree to and with the plaintiff, his executors and administrators, that he, the defendant, should and would well and faithfully serve him, the plaintiff, as his assistant, in the business or profession of a surgeon-dentist, for the term of five years, from the 20th day of *October* then next ensuing, according to the terms and conditions thereafter expressed; and the plaintiff, in consideration of such service, and of the covenants and agreements on the part of the defendant, his executors and administrators, thereafter contained, for himself, his heirs, executors, and administrators, did covenant, promise, and agree, to and with the defendant, his executors and admi-

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nistrators, that he, the plaintiff, his heirs, &c., should and would well and truly pay, or cause to be paid, unto the defendant, his executors or administrators, the salaries or yearly sums following, that is to say, for the first year of the said term of five years, the sum of 120*l.*, for the second year the sum of 140*l.*, for the third year the sum of 160*l.*, for the fourth year the sum of 180*l.*, and for the fifth and last year the sum of 200*l.*, to be paid half yearly, at the expiration of each successive half year during the said term: and also that he, the plaintiff, should and would, during the said term of five years, teach and instruct the defendant in the said business or profession of a surgeon-dentist, according to the best of his skill and knowledge. And the defendant did, in and by the said articles of agreement, for himself, his heirs, executors, and administrators, covenant, promise, and agree to and with the plaintiff, his executors and administrators, that he, the defendant, should and would, for and during the said term of five years, from the said 20th day of *October* then next ensuing, and fully to be complete and ended, faithfully and diligently serve him, the plaintiff, as his assistant in the business or profession of a surgeon-dentist, and would not depart from the service of the plaintiff without giving three calendar months' previous notice in writing to the plaintiff of such his intention; and that the defendant should not nor would, at the expiration or other sooner determination of the said term (provided the plaintiff were then living and practising in the said profession or business of a surgeon-dentist), *exercise or practise the profession or business of a surgeon-dentist at or within one hundred miles of the said city of York, without the previous consent in writing of the plaintiff, under the penalty of 1,000*l.*, to be forfeited and paid by the defendant, his executors or administrators, and to be recoverable in any of his Majesty's Courts of record at Westminster, as and for liquidated damages.* And it was by the said articles of agreement further declared,

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that it should and might be lawful for the plaintiff, at any time during the said term of five years, to discharge and dismiss the defendant from his service, by giving to the defendant three calendar months' previous notice in writing for that purpose; as, by the articles of agreement, reference being thereunto had, would, amongst other things, more fully and at large appear. The plaintiff then averred, that, afterwards, to wit, on &c., at *York*, the defendant entered and was received into the service of the plaintiff under the said articles of agreement, and continued therein for a long space of time, to wit, until the 3rd day of *May*, 1830, when the term was determined by a notice in writing from the defendant to the plaintiff; and that afterwards, and after the determination of the said term, to wit, on &c., and on divers other days and times between that day and the day of exhibiting this bill, the defendant did exercise the profession or business of a surgeon-dentist within one hundred miles of the city of *York*, without the previous consent in writing of the plaintiff, although he, the plaintiff, was, during all that time, living and practising in the said profession or business of a surgeon-dentist, to wit, at *York*, whereby an action had accrued to the plaintiff to demand and have of and from the defendant the said sum of 1,000*l.* above demanded. Plea—*Non est factum*.

At the trial, before Mr. Justice *Littledale*, at the last Assizes at *York*, the plaintiff proved the execution of the articles of agreement by the defendant; and that he had left the plaintiff and set up business for himself as a dentist, at *Halifax*, which is distant between forty and fifty miles from the city of *York*.

For the defendant, it was contended, that this action could not be maintained, on two grounds—*first*, that the agreement was void as being in restraint of trade, the distance prohibiting the defendant from exercising the profession of a dentist within one hundred miles of *York*, being unreasonable—and *secondly*, that, even if the agreement

were valid; the sum of 1,000*l.* therein mentioned was in the nature of a penalty, and not liquidated damages; and, therefore, that the plaintiff could only be entitled to recover such actual damage as he might prove himself to have sustained. But the learned Judge was of opinion, that, under the plea of *non est factum*, the only question was, whether the defendant had executed the agreement; and, therefore, that the Jury were precluded from considering the points raised as to the validity of the agreement, or the actual damage the plaintiff had sustained by a breach of it by the defendant: and the learned Judge also thought, that, by the terms of the agreement, the 1,000*l.* must be considered as ascertained or liquidated damages; and he directed a verdict to be taken for the plaintiff, debt 1,000*l.*, damages one shilling.

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Mr. Serjeant *Wilde*, in the last term, obtained a rule nisi that this verdict might be set aside and a new trial granted, or that the judgment might be arrested.—*First*, the defendant is entitled to a new trial, as the learned Judge ought to have received evidence as to the damage the plaintiff had actually sustained by the defendant setting up in business at *Halifax*, particularly, as the sum stated in the agreement must be considered as a penalty, and not liquidated damages. At all events, the agreement is illegal upon the face of it, as being contrary to public policy, and in restraint of trade; and, as it is set out on the record, the defendant is entitled to avail himself of the objection in arrest of judgment. The contract not only imposes a most unreasonable restraint on the defendant, but, in point of fact, might utterly prohibit him from acquiring a livelihood for a breach of any part of it, and if he were to draw a single tooth within one hundred miles of the city of *York* within five years, he would incur a forfeiture of 1,000*l.*, which is a larger sum than he was to receive from the plaintiff for his (the defendant's) services during the whole of that period. An agreement in restraint of trade must be founded

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on a reasonable consideration; and here, the plaintiff was empowered to dismiss the defendant from his service at any time, by giving him three months' previous notice in writing. In *Young v. Timmins (a)*, where, by an agreement between two persons as factors, and one of their workmen, it was stipulated that he should not work for any other person without their specific consent in writing, to be obtained on every occasion, with the exception of persons residing in *London*, or within six miles thereof; it was held, that the agreement being in partial restraint of trade, and not having an adequate consideration to support it, was void, and that a promissory note given by the workman to his employers, in consideration of breaches of the agreement in working for other persons, was also void. So, here, the agreement not only imposes an unreasonable restraint on the defendant, but is without adequate consideration, and is consequently void.

Mr. Serjeant *Russell*, on a former day in this term, shewed cause.—*First*, whether the distance prescribed by the plaintiff were reasonable or not, could not be shewn by the defendant under the plea of *non est factum*; for, in *Edwards v. Brown (b)*, it was held, that if a party who executes a bond, is at the time competent to execute it, he cannot, under the plea of *non est factum*, shew that he was misled as to the legal effect of the instrument; and Mr. Justice *Bayley*, in delivering the judgment of the Court, referred to *Whelpdale's case (c)*, where it was resolved, "that, when a bond or other writing is by an act of Parliament enacted to be void, the party who is bound cannot plead *non est factum*; but, in construction of law, the deed is to be avoided by the party who is bound by it, by pleading the special matter, taking advantage of the act of Parliament: for, although the act makes the bond or

(a) 1 Crompt. & Jerv. 331.

(b) 1 Crompt. & Jerv. 307.

(c) 5 Rep. 119

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other writing void, yet thereto the law doth *tacitly* require order and manner, which the obligor ought to follow."

Secondly, the words of the agreement are, that the defendant should not exercise the profession of a surgeon-dentist at or within one hundred miles of the city of *York*, without the previous consent of the plaintiff, under the penalty of 1,000*l.*, to be forfeited and paid by the defendant, and to be recoverable as and for liquidated damages. The parties, therefore, have expressly stipulated that that sum should be payable as liquidated damages; and, in the late case of *Kemble v. Farren* (*a*), where all the previous authorities on this point are referred to, the principle was established, that liquidated damages cannot be reserved on an agreement containing various stipulations of various degrees of importance, unless the agreement specify the particular stipulation or stipulations to which the liquidated damages are to be confined; and Lord Chief Justice *Tindal* drew the distinction, and said—"If the clause had been limited to breaches which were of an uncertain nature and amount, we should have thought that it would have had the effect of ascertaining the damages upon any such breach at 1,000*l.*; for we see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they may agree. In many cases, such an agreement fixes that which is almost impossible to be accurately ascertained; and, in all cases, it saves the expense and difficulty of bringing witnesses to that point. But, in the present case, the clause is not so confined; it extends to the breach of any stipulation by either party." In *Davies v. Penton* (*b*) the parties bound themselves for the true performance of all the agreements contained in the articles, in the penal sum of 500*l.*, to be recoverable for the breach of the agreement, in any Court of law, as

(*a*) 3 Moore & Payne, 425; S. C. 6 Bing. 141.

(*b*) 6 Barn. & Cress. 216.

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and by way of liquidated damages; and, although the Court held that the sum was a penalty, and not liquidated damages; yet Lord Chief Justice *Abbott* said—"Whoever framed this agreement does not appear to have had any very clear idea of the distinction between a penalty and liquidated damages; for the sum of 500*l.* is described in the same sentence as a penal sum and as liquidated damages. Now, both expressions cannot be satisfied." And Mr. Justice *Bayley* said—"We must look at all the parts of this instrument, in order to ascertain whether it was the intention of the parties that the sum of 500*l.* should be a penalty or liquidated damages." And here, there can be no question but that the parties meant that the sum of 1,000*l.* should be forfeited and paid by the defendant as liquidated damages.

Lastly, as to the validity of the agreement, and on which it has been said that the judgment must be arrested, notwithstanding the verdict for the plaintiff; the case of *Mitchel v. Reynolds* (a) established the principle, that a contract or agreement to restrain a person from exercising a particular trade in a particular place, if made upon a reasonable and adequate consideration, is good; but that it is otherwise, if there be no reasonable consideration, and the agreement restrains the party from trading at all; and that, where the law allows a restraint of trade, it is not illegal to enforce it with a penalty; and, in *Davis v. Mason*, Lord *Kenyon* said (b)—"This question has been at rest ever since the case of *Mitchel v. Reynolds*." In *Comyns's Digest* (c), it is said—"If a man, for good consideration, restrains himself from the exercise of his trade in a particular place, he shall be bound by it;" and here, the payment of an increasing annual salary to the defendant, and teaching and instructing him in the plaintiff's business, is an adequate consideration

(a) 1 Peere Wms. 181.

(b) 5 Term Rep. 120.

(c) Tit. "Trade," (D. 3).

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for the defendant's undertaking not to practise as a surgeon-dentist within one hundred miles of the city of *York*; and although it may be said that such distance is much too extensive, yet, in *Davis v. Mason*, where a party gave a bond not to practise as a surgeon for fourteen years, within ten miles of the town where the plaintiff resided, the bond was held good in law; and Lord *Kenyon* said—"It was objected, that the limits within which the defendant engaged not to practise are unreasonable. I do not see that they are necessarily unreasonable, nor do I know how to draw the line." The case of *Young v. Timmins* is altogether distinguishable from the present, for Lord Chief Baron *Lyndhurst* said (a)—"The terms are, that Messrs. *Timmins* (the defendants) should employ *Ireland* in the way of his trade, as heretofore. Supposing their business to decline, in what situation does *Ireland* stand? He is not allowed to solicit orders for himself, and they may not have sufficient business to employ him. He must, therefore, remain idle;" and, as he was placed entirely at the mercy of the defendants, there was no adequate consideration for the agreement for him to work exclusively for them. In *Wickers v. Evans* (b), where three persons carrying on the trade of trunk-makers had travelled into various parts of the country for the purpose of selling their trunks, and had sustained great loss and inconvenience on account of exercising their trade in the same places, and they agreed that they would not continue any longer to trade throughout the country, or carry on a rivalry—it was held, that, as the parties contemplated a partial restraint of trade only, the agreement was valid, and founded on a sufficient consideration. So, here, the defendant agreed not to interfere with the plaintiff's practice within the limits of a certain distance from the city of *York*, where the plaintiff resided. In *Mitchel v. Reynolds*

(a) 1 Crompt. & Jerv. 339.

(b) 3 Younge & Jerv. 318.

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the defendant bound himself not to exercise the trade of a baker within a parish named in the condition of the bond, for the term of five years, and the Court held that the bond was good; and Mr. Serjeant *Williams*, after abstracting that case, draws this conclusion from it (a), namely, "That wherever a sufficient consideration appears to make it a proper and useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but, with this constant diversity, *viz.* where the restraint is *general*, not to exercise a trade throughout the kingdom; and where it is limited to a *particular place*; that the former is void, being of no benefit to either party, and only oppressive, but the other is good." That is expressly in point, and in favour of the plaintiff. In *Hayward v. Young* (b), a bond conditioned, not to set up business as a surgeon or man-midwife in the town of *Aylesbury*, or within twenty miles, was held not to be illegal as in restraint of trade. In *Homer v. Ashford*, Lord Chief Justice *Best* said (c)—"The law will not permit any one to restrain a person from doing what the public welfare and his own interest require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the *kingdom*, would be void, because no good reason can be imagined for any person's imposing such a restraint on himself. But it may often happen, that individual interest and general convenience render engagements not to carry on trade, or to act in a profession in a particular place, proper." In *Bunn v. Guy* (d), an agreement entered into by a practising attorney to relinquish his business to two other attorneys for a valuable consideration, and that he would not himself practise in the profession of the law, within *London* and one hundred and

(a) 2 Wms. Saund. 166, n. (1). B. Moore, 91.

(b) 2 Chit. 407.

(d) 4 East, 190.

(c) 3 Bing. 326; S. C. 11 J.

fifty miles from thence, was held to be a valid agreement; and although, in *Boson v. Farlow*, the Master of the Rolls said (a)—“The Lord Chancellor doubted not only the propriety, but the legality, of some of the conditions in the agreement in *Bunn v. Guy*; and, though it was ultimately determined that they were not illegal, I think that he would hardly have decreed them to be specifically executed;” yet his Honour had previously observed, that in that case it was stipulated, lastly, and principally, that the attorney relinquishing his business should endeavour, by all the means in his power, to influence and induce his clients to become the clients of the attorneys who succeeded him.

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Mr. Serjeant *Wilde* and Mr. Serjeant *Jones*, in support of the rule.—Admitting that the sum of 1,000*l.* may be considered as liquidated damages, yet the agreement is void, and cannot be supported at law. All contracts in restraint of trade are *primâ facie* illegal, and the *onus* of shewing that they are reasonable, useful, and proper, and founded on an adequate consideration, is thrown on a party who seeks to enforce them. Here, however, the restraint on the defendant is most unreasonable, and the consideration wholly inadequate for his undertaking not to practise as a surgeon-dentist for the space of five years, within one hundred miles of the city of *York*. It is not necessary to dispute the principle established in *Mitchel v. Reynolds*, which is the leading case on this subject. Lord Chief Justice *Parker*, in treating of contracts of this description, there said (b)—“The rule is, that, wherever such contract *stat indifferenter*, and, for ought appears, may be either good or bad, the law presumes it *primâ facie* to be bad; and that all contracts, where there is a bare restraint of trade, and no more, must be void.” It is contrary to public policy to restrain a party from earning his living; and here, the question is, whether the restraint imposed

(a) 1 Meriv. 472.

(b) 1 Peere Wms. 192.

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on the defendant is reasonable as between the parties themselves, and beneficial to the public. As the plaintiff agreed to pay the defendant 120*l.* as his first year's salary, it is evident that he was experienced in practice when he entered into the plaintiff's service; and the whole of the defendant's salary, for the full term of five years, does not amount to 1,000*l.*; and, can it be said, that the defendant would forfeit that sum if he were to draw a single tooth within a hundred miles of the city of *York*? It is not to be assumed that the plaintiff left his residence or practised beyond the limits of that city; and the profession of a surgeon-dentist differs altogether from the case of a tradesman, who may execute his orders by correspondence, and carry on his trade by agents or servants; for here, the personal skill of the operator is required. His professional knowledge is beneficial to the health of the public, and it is a moral duty imposed on him to relieve his fellow sufferers. If the parties had been surgeons instead of surgeon-dentists, it is quite clear that the restraint imposed on the defendant is unreasonable, and without an adequate consideration, and therefore the agreement is altogether void. Besides, there is no mutuality in the contract, for it is utterly impossible that the plaintiff can receive a benefit at all commensurate with the injury he may occasion the defendant by restraining him from practising over a circle, the diameter of which is two hundred miles, and comprising several counties. If, therefore, the agreement be illegal in itself, the defendant might avail himself of it under the plea of *non est factum*; and the distance prescribed might or might not be reasonable, which would depend in a great measure on locality and population, and was a question for the consideration of the Jury. Again, whether the distance were reasonable or not, is a mixed question of law and of fact, and it was incumbent on the plaintiff to have shewn what injury he had actually sustained by the defendant's setting up at *Halifax*. The

Court must look at the whole of the agreement, and it is the policy of the law to support the freedom of trade; and, therefore, all contracts or agreements imposing particular restraints on individuals, are, *primâ facie*, presumed to be void. In the Year Book, Mr. Justice *Hall* is stated to have said (a)—“*A ma intent vous purres aver demurre sur luy que le obligation est void, eo que le condition est encoun- tre commun ley, et per Dieu si le plaintiff fait icy, il irra al prison tanq: il ust fait fine au Roy;*” and, in *Mitchel v. Reynolds*, Lord Chief Justice *Parker* said (b)—“That he could not but approve of the indignation that Judge expressed, though not his manner of expressing it.” *Secondly*, whether the sum of 1,000*l.* mentioned in the agreement is a penalty, or liquidated damages, must depend on the predominant intention of the parties. Here, the word “*penal- ty*,” as well as the words “*liquidated damages*,” are used, which distinguishes this from all the previous decisions, with the exception of *Davies v. Penton*, where they were introduced; and Mr. Justice *Bayley* said (c)—“Where the sum which is to be a security for the performance of an agreement to do several acts, will, in case of breaches of the agreement, be, in some instances too large, and in others too small a compensation for the injury thereby occasioned, that sum is to be considered a penalty.” That is the true distinction; and Mr. Justice *Holroyd* said—“If it is a penalty, the Court will treat it as such; and the stipulation that it shall be recovered as liquidated damages will not prevent the party from insisting on the compulsory provision of the statute 8 & 9 *Will.* 3, c. 11, s. 8, as to as- sessing damages;” and Mr. Justice *Littledale* said—“Since the statute, parties in framing agreements have frequently changed the word ‘*penalty*’ for ‘*liquidated damages*,’ but the mere alteration of the term cannot alter the nature

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(a) 2 Hen. 5, fol. 5.

(b) 1 Peere Wms. 193.

(c) 6 Barn. & Cress. 223.

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of the thing; and if the Court see, upon the whole agreement, that the parties intended the sum to be a penalty, they ought not to allow one party to deprive the other of the benefit to be derived from the statute." So, here, the sum of 1,000*l.*, which, in the agreement is called a penalty, must be treated as such, although it is stated that it is to be recovered as and for liquidated damages.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court, as follows:—

Two questions arise upon the deed on which this action is brought, and which is set out upon the face of the declaration:—the *first*, whether the deed is void, as being in restraint of trade—the *second*, supposing the deed to be a valid deed, whether the sum therein mentioned to be payable upon breach of the covenant is a penalty only, or is to be considered as the liquidated amount of damages to be recovered by the plaintiff.

The deed purports to be an agreement under seal between the plaintiff and defendant, whereby the defendant covenants with the plaintiff, that he, the defendant, would faithfully serve the plaintiff as an assistant in the business and profession of a surgeon-dentist for five years; and the plaintiff, in consideration of such service, and of the covenants of the defendant, did covenant with the defendant to pay him the yearly salaries therein mentioned, and to instruct him in the business or profession of a surgeon-dentist; and the defendant covenanted that he would, during the said term of five years, faithfully and diligently serve the plaintiff as his assistant, and would not depart from his service, without giving him three calendar months' notice in writing of such his intention; "and that the said defendant should not nor would, at the expiration or other sooner determination of the said term (provided the said

plaintiff were then living, and practising in the said business or profession of a surgeon-dentist), exercise and practise the said business or profession at or within the distance of one hundred miles of the city of *York*, without the previous consent in writing of the said plaintiff, under the penalty of 1,000*l.*, to be forfeited and paid by the defendant, his executors and administrators, and to be recovered in any of his Majesty's Courts of record at *Westminster*, as and for liquidated damages." The deed then contains a clause, by which the plaintiff might determine the service by giving three months' notice in writing.

The first question is, whether this agreement is void in law. The law upon this subject has been laid down with so much authority and precision, by Lord Chief Justice *Parker*, in giving the judgment of the Court of *King's Bench* in the case of *Mitchel v. Reynolds* (a), which has been the leading case upon the subject from that time to the present, that little more remains than to apply the principle of that case to the present. Now, the rule laid down by the Court in that case is, "that voluntary restraints, by agreement between the parties, if they amount to a *general* restraint of trading by either party, are void, whether with or without consideration; but *particular* restraints of trading, if made upon a good and adequate consideration, so as it be a proper and useful contract," that is, so as it be a reasonable restraint only, "are good."

The present case does not fall within the first class of contracts, as it certainly does not amount to a general restraint of the defendant from carrying on his trade or business; he may do so beyond the distance of one hundred miles from the city of *York*; and he may do so within that distance after the plaintiff has ceased to practise. But the question is, whether this contract, which is in particular and partial restraint of trade only, and is made upon some

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(a) 1 Peere Wms. 181.

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consideration, is made upon a good and sufficient consideration, and is in itself a reasonable restraint of the defendant's carrying on that trade in which the plaintiff had agreed to receive the defendant as his assistant. Now, as to the consideration, it must be confessed it is very small, compared with the restraint under which the defendant consents to place himself. The plaintiff takes the defendant as his assistant for five years, at a salary of 120*l.* for the first year, to be afterwards increased, with a power to dismiss him at any time, by a three months' notice. The defendant covenants not to exercise or practise the profession within one hundred miles of the city of *York*, if the plaintiff continues to carry on his business of a surgeon-dentist, under the penalty of 1,000*l.* The defendant, in order to be capable of being employed by the plaintiff as an assistant in a profession requiring skill and experience, and at a considerable salary, must have been a person having some skill and experience, which he had before acquired. At the time of entering into this contract he was at liberty to set up his trade, and endeavour to gain his livelihood within the city of *York*. But, under the present contract, after being employed by the plaintiff for three months only, and receiving, in consequence, no more than the sum of 30*l.*, he was liable to be prevented from carrying on his business, and earning his livelihood, within the large space comprehended within a circle drawn with a distance of one hundred miles from the city of *York*. Surely this appears a very slender and inadequate consideration for such a sacrifice. But the greater question is, whether this is a reasonable restraint of trade; and we do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary

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protection of the party can be of no benefit to either; it can only be oppressive; and, if oppressive, it is in the eye of the law unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy. In the case above referred to, Lord Chief Justice *Parker* says—"a restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good:" which are rather instances and examples, than limits of the application of the rule, which can only be, at last, what is a reasonable restraint with reference to the particular case. In that case, the plaintiff had assigned to the defendant the lease of a house in the parish of *A.* for five years; and the defendant entered into a bond, conditioned that he would not exercise the trade of a baker within that parish, during the term; and the restraint was held good, because not unreasonable, either as to time or distance, and not longer than might be necessary for the protection of the plaintiff in his established trade.

No certain precise boundary can be laid down, within which the restraint would be reasonable, and beyond which, excessive. In *Davis v. Mason (a)*, where a surgeon had restrained himself not to practise within ten miles of the plaintiff's residence, the restraint was held reasonable. In one of the cases referred to by the plaintiff, one hundred and fifty miles was not considered an unreasonable restraint, where an attorney had bought the business of another who had retired from the profession. But it is obvious that the profession of an attorney requires a limit of a much larger range, as so much may be carried on by correspondence, or by agents. And, unless the case was such that the restraint was plainly and obviously unnecessary, the Court would not feel itself justified in interfering. It is to be remembered, however, that contracts in re-

(a) 5 Term Rep. 118.

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straint of trade are in themselves, if nothing more appears to shew them reasonable, bad in the eye of the law; and, upon the bare inspection of this deed, it must strike the mind of every man, that a circle round *York*, traced with the distance of one hundred miles, incloses a much larger space than can be necessary for the plaintiff's protection. The nature of the occupation, which is one that requires the personal presence of the practiser and the patient together at the same place, shews at once that the plaintiff has shut out the defendant from a much wider field than can by possibility be occupied beneficially by himself. There is, therefore, on the one hand, no reason why the defendant should not gain his livelihood, nor, on the other, why the public should not receive the benefit of his skill and industry, through so wide a space. The contract appears still further unreasonable on this ground; as it is to hold good during the whole time the plaintiff continues to carry on his business, wherever he may be: so that, if the plaintiff removed from *York*, to places where the practice at *York* by the defendant could not injure him, still the restriction continues. We therefore think the contract is one which contains a restraint of the defendant to carry on his trade, far larger than is necessary for the protection of the plaintiff in the enjoyment of his trade; and, consequently, that the covenant creating such restraint cannot form the subject of an action.

The opinion we have formed on this point makes it unnecessary that we should discuss the other ground of objection; indeed, that objection would only go to an assessment of damages, by a suggestion of breaches on the present record.

Upon the whole, we think the judgment upon this record should be arrested.

Rule absolute.

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Monday,
June 13th.

THIS was an action of covenant. The plaintiff, in his declaration, alleged, that one *David Bates*, being seised or possessed of a certain messuage or tenement, for a term, whereof twenty years and two hundred and thirty-three days were unexpired, he, by an indenture of lease bearing date the 3rd November, 1814, demised the premises to one *James Meek*, for the term of twenty-one years, wanting twenty-one days, to be computed and taken from the 24th June, 1814, at the yearly rent of 50*l.*, payable quarterly; that *Meek* entered into covenants to pay the rent without any deduction, and to keep the premises in repair, and that he entered and became possessed of the premises for the residue of the said term: that *Bates*, on the 12th February, 1816, by a certain deed-poll indorsed on the counterpart of the indenture of demise to *Meek*, granted, sold, assigned, and set over to one *John Langdon*, his executors, administrators, or assigns, all his (*Bates's*) estate, right, title, and interest in the premises, to have and to hold the same to *Langdon* from thenceforth for all such time or term therein, as in the counterpart of the indenture of demise mentioned: that, by indenture of the 15th July, 1822, *Langdon* granted, sold, assigned, and set over all his estate, right, title, and interest of and in the demised premises to the plaintiff, to hold to him for the term of one year; and

A., being seised in fee of certain premises, by indenture of the 5th July, 1814, demised them for twenty-one years to *B.*, who entered, and was possessed accordingly. *B.*, by indenture of the 3rd November, demised the premises to *C.* for the residue of his term therein, excepting the last twenty-one days; and on the 12th February, 1816, *B.*, by deed poll, indorsed on the counterpart of the lease to *C.*, granted all his *B.'s* estate and interest in the premises to *A.*, to hold to him for all such time or term in the counterpart of the lease mentioned, namely, the next immediate reversion, expectant on the determination of *B.'s* lease. *A.*, by deeds of lease

and release, of the 15th and 16th July, 1822, granted, sold, and assigned all his estate and interest in the premises to the plaintiff, by way of mortgage. On the 19th October, 1816, *C.* assigned all his interest in the premises to the defendants, who never entered, and *C.* remained in possession. In an action brought against the defendants for non-payment of rent:—*Held, first*, that the deed poll did not operate as a surrender of *B.'s* reversion of twenty-one days to *A.*, but only his interest for the term co-extensive with *C.'s* lease; and that the plaintiff might sue the defendants on the covenants contained in such lease. *Secondly*, that the deed poll did not merge the chattel interest in the fee, or suspend the plaintiff's right to sue on the lease to *C.* *Thirdly*, that the reversionary interest expectant on *C.'s* lease, passed to the plaintiff, by the deeds of lease and release, the chattel interest as well as the fee, and that it was properly described in the declaration as an assignment of the chattel interest; and *Lastly*, that the defendants were liable for a breach of the covenants in *C.'s* lease, although they had never entered into possession, they having accepted and retained the deed of assignment.

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that, by indenture of the 16th *July*, 1822, *Langdon* granted, sold, assigned, and set over to the plaintiff all his estate, right, title, claim, and interest, of and in the demised premises, to hold to the plaintiff, his executors, administrators, &c., for all such time or term of years as in the said counterpart of the indenture of demise to *Meek* is mentioned, subject to a proviso for making void the same, upon payment by *Langdon* to the plaintiff of 700*l.*, with lawful interest, upon the 15th *July* then next ensuing: that, on the 19th *October*, 1816, all the estate, right, title, claim, and interest of *Meek*, of and in the demised premises, came to and vested in the defendants by assignment thereof; and that, on the 29th *September*, 1828, the sum of 500*l.* became and was due for ten years' rent, reserved on the indenture of demise from *Bates* to *Meek*; and that the defendants did not repair the premises after the assignment to them, and during the continuance of the demise so made to *Meek* as aforesaid, but wholly refused and neglected so to do. The defendants pleaded eleven pleas—*first*, *non est factum*. In the *second* to the *eighth*, inclusive, various facts were set out and alleged to be in bar of the plaintiff's right to maintain this action, and which in substance were as follows:—That *John Langdon*, being seised in fee in the premises in question, he, by indenture of the 5th *July*, 1814, demised them for twenty-one years from the 24th *June*, 1814, to *Bates*, who entered and became possessed; that *Bates*, being so possessed, he, by indenture of the 3rd *November*, 1814, demised the premises to *Meek* for the residue of his (*Bates's*) term therein, excepting the last twenty-one days: that, at the time of the execution of the deed poll of the 12th *February*, 1816, *Langdon* still continued seised in fee of the reversion, expectant on the determination of *Bates's* lease, and that *Bates* did, by the deed poll last referred to, surrender up to *Langdon*, who accepted the same, the next immediate reversion, expectant on the determination of *Meek's* under-lease (to which the covenants in his lease were incident), whereby, as the defendants

alleged, the said immediate reversion *became merged* in *Langdon's* fee. In the *fourth* plea, the deed poll was set out on oyer, and it was alleged, that all rights of action upon the covenants in the indenture of demise of the 3rd November, 1814, became and were thereby *suspended*. By that instrument, *Bates* granted, sold, assigned, transferred, and set over to *Langdon*, his executors, administrators, and assigns, the within-written indenture of demise of the 3rd November, 1814, and the messuage or tenement, with the appurtenances thereby granted, and all his (*Bates's*) estate, right, title, interest, time, and term of years then to come and unexpired, possession, property, benefit, claim, and demand whatsoever and where-soever, of, in, and to the same premises, or any part thereof, and the rent reserved by virtue of the said within-written indenture, or otherwise howsoever, to have and to hold the said messuage or tenement and premises unto the said *John Langdon*, his executors, administrators, or assigns, from thenceforth, *for all such time or term therein* as in the within-written indenture of the 3rd November, 1814, is mentioned. The defendants pleaded, *ninthly*, that all *Meek's* estate and interest in the demised premises did not legally vest in them by assignment. *Tenthly*, that no rent was due or in arrear from the defendant to the plaintiff. And *lastly*, that the premises were not out of repair. Upon which pleas issues were joined. The plaintiff demurred to the fourth plea, and the defendants joined in demurrer. The cause came on for argument on the demurrer in *Easter Term*, 1829, when, after hearing—

Mr. Serjeant *Scriven*, for the plaintiff, and—

Mr. Serjeant *Taddy*, for the defendants.

The Court took time to consider, and, on the last day of that term, they directed a second argument.

In *Easter vacation*, 1829, the cause came on to be tried

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before Lord Chief Justice *Best*, at *Westminster*, on the ten pleas on which issues were joined, when the Jury found a verdict for the plaintiff on the tenth and last pleas, and assessed his damages on the tenth at 31*2*l. 10*s.*, and on the last at 130*l.*

In *Trinity* Term, 1829, Mr. Serjeant *Taddy* obtained a rule *nisi* that this verdict might be set aside and a nonsuit entered, on the ground of a variance between the declaration and evidence, the plaintiff having alleged, that, by the indenture of the 16th *July*, 1822, *Langdon* had assigned to him a leasehold or chattel interest, whereas, upon the production of that instrument, it appeared to be a conveyance of the fee by deeds of lease and release, dated respectively on the 15th and 16th *July*, 1822, and in which no chattel interest was specified, nor was any outstanding term mentioned. The learned Serjeant submitted, that, as the deeds were not set out on the record according to their legal operation, the plaintiff should have been nonsuited; and, on the objection being taken at the trial, the late Lord Chief Justice reserved the point for the consideration of the Court.

Mr. Serjeant *Wilde*, being on a subsequent day about to shew cause, the Court said, that, as the objection arose on the legal construction and effect of the deeds produced in evidence at the trial, and particularly those of the 15th and 16th *July*, 1822, the best course to pursue was to state the facts in a special verdict, when the deeds might be set out and their effect and operation fully discussed, and that the further argument on the demurrer to the fourth plea should be postponed till after the argument on the special verdict.

In the special verdict, the whole of the record was set out, with the exception of the fourth plea, and the demurrer thereto. The deeds of the 15th and 16th *July*, 1822, were then stated at length, and which appeared to have been a mortgage in fee by bargain and sale for

a year, and release from *Langdon* to the plaintiff; and, by the deed of release, *Langdon* granted, bargained, sold, aliened, released, and confirmed to the plaintiff the premises then in the occupation of *Meek*, together with all easements, profits, commodities, emoluments, advantages, and appurtenances whatsoever to the same belonging or appertaining, and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits of the same, and of every part and parcel thereof, and all the estate, right, title, interest, use, trust, possession, property, claim, and demand at law and in equity, of him (*Langdon*), in and to the same, to have and to hold to the plaintiff, his heirs and assigns for ever. Then followed a clause of redemption or proviso for a reconveyance to *Langdon*, on payment by him to the plaintiff of the sum of 700*l.*, with lawful interest for the same on or before the 15th *July*, 1823.

The deed of assignment of the 19th *October*, 1816, from *Meek* to the defendants, was then set out, whereby, after reciting the lease from *Bates* to *Meek*, he (*Meek*) assigned to the defendants all his estate and interest in the premises, subject to the rents and covenants, upon trust that they should permit and suffer *Meek* to occupy the premises until demand should be made of payment of the sum of 420*l.*, and interest, upon payment of which sum the assignment was to be void; and, upon further trust, that, if default should be made in such payment, the defendants might enter, and sell and dispose of the term, and pay themselves the said sum of 420*l.*, and all arrears of interest.

It was then found in and by the special verdict, that no demand had been ever made upon *Meek* for payment of the said sum of 420*l.* and interest, and that he had continued in possession of the premises from the time of his executing the deed of assignment to the defendants; that they had never entered, nor ever become actually possessed of the premises, or in any manner acted upon the said in-

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indenture of the 19th *October*, 1816, otherwise than by receiving that indenture, and the indenture of demise from *Bates* to *Meek*, into their possession, and retaining them ever since.

The special verdict came on for argument in the last *Michaelmas* Term.

Mr. Serjeant *Wilde*, for the plaintiff.—*First*, the deeds of lease and release of the 15th and 16th *July*, 1822, conveyed the largest possible interest to the plaintiff, *namely*, the fee, and if so, it passed the minor, *namely*, the chattel interest also. If it were the intention of the parties that both interests should pass, and the words of the deed conveying it are large enough, the Court will give effect to such intent. There can be no doubt but that the parties meant that the plaintiff should have the benefit of all the covenants contained in *Meek's* lease; and, as the main object was to pass the whole of the estate, the method of doing it ought to be subservient to that end; and it is an established rule, that a deed shall never be laid aside as void, if by any construction it can be made good (a). So, in *Marshall v. Franks* (b), where a conveyance was void as a lease and release, because the releasor had only a term for years in the land, it was resolved that it should operate as a grant and assignment. In *Sheppard's Touchstone* (c) it is laid down, that when a deed cannot take effect according to the letter, it must be construed so as it may take some effect or other. Again, it is said (d), "some words in deeds are large, and have a general extent; and some have a proper and particular application: and the former sort may contain the latter." In *Cruise's Digest* (e), it is said—"Where a deed cannot operate in the way intended by the parties, it will be construed in such a manner as to operate, if possible, in some other way, *quando*

(a) 2 Wms. Saund. 96 a, n. 1.

(c) 6th edit. p. 87.

(b) Gilb. Rep. 143; S. C. Vin.

(d) Id. 91.

Abr. tit. "*Deeds*," F. 2.

(e) Vol. 4, p. 263.

quod ago non valet ut ago, valeat quantum valere potest; and *Hobart* (a) is referred to. The same principle is deducible from *Sanders on Uses* (b) and *Perkins* (c). In *Sheppard's Touchstone* it is said (d), "if one have divers estates in land, and he make any charge or grant upon or out of it, this shall issue out of all his estates;" and here, there can be no doubt but that the parties intended to pass the chattel interest as well as the fee. In *Roe d. Earl of Berkley v. Archbishop of York, Lord Ellenborough*, in delivering the judgment of the Court, said (e)—"One of the first rules for the construction of deeds is, *verba intentioni, et non e contra, debent inservire* (f). And, in *Goodtitle v. Bailey* (g), Lord *Manfield* lays it down, that deeds shall be construed as to operate according to the *intention* of the parties, if by law they may; and, if they cannot operate in one form, they shall operate in that which by law will effectuate the *intention*. And such was the law in the time of Lord *Coke* as to conveyances by the common law; for it is laid down in 1 *Inst.* (h)—"That, where a man has two ways to pass lands, and both by the common law, and he *intends* to pass them by one of the ways, yet, *ut res magis valeat*, it shall pass by the other;"—and here, it was the evident intention of the parties to pass all *Langdon's* interest to the plaintiff, which will embrace the chattel interest as well as the fee, and it was not necessary to set out the deed in terms or at length in the declaration:—it was sufficient to state it according to its legal effect. In *Moore v. The Earl of Plymouth*, Lord Chief Justice *Abbott* said (i)—"It is a general rule, that deeds should be pleaded according to their legal operation;" and Mr. Justice *Holroyd* said—"In deducing title, I have understood

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(a) Page 277.

(b) Vol. 2, p. 79.

(c) Sect. 161, p. 81.

(d) Page 85.

(e) 6 East, 104-5.

(f) Shepp. Touchstone, 86.

(g) Cowp. 600.

(h) Page 49.

(i) 3 Barn. & Ald. 63.

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it to be an established rule, that conveyances are to be pleaded as they operate;" and, in *Gully v. The Bishop of Exeter* (a), where the declaration alleged, that a party by deed conveyed the purparty of an advowson, and by the deed he had conveyed the whole, although he possessed only a purparty, yet it was held to be no variance; for, as Lord Chief Justice *Best* said—"The declaration does not profess to describe the deed *in verba*, but only to state its effect."

Secondly, by the deed poll of the 12th February, 1816, *Bates's* immediate reversion, expectant on the determination of *Meek's* lease, only passed to *Langdon*, and the deed did not operate as a surrender of *Bates's* reversion of the twenty-one days after the expiration of such lease; therefore, as soon as that lease was determined, all the interest which *Langdon* took under the deed poll ceased, and *Bates* again became entitled to hold the premises for the twenty-one days, being the residue of the term originally granted to him. The deed poll, therefore, cannot operate as an absolute surrender of *Bates's* reversion to *Langdon*, or as a merger of *Bates's* term, because only a reversionary interest passed commensurate with *Meek's* lease, after the determination of which twenty-one days remained to *Bates*, the original lessee. In *Tomlins's Law Dictionary* (b), it is said—"A reversion hath two significations; the one is an estate left, which continues during a particular estate in being; and the other is the returning of the land after the particular estate is ended. It is said to be an *interest in the land, when the possession shall fall*, and so it is commonly taken; or it is when the estate, which was parted with for a time, ceaseth, and is determined in the persons of the alienees or grantees, &c., and returns to the grantor or donor, or their heirs, from whence derived;" and

(a) 4 Bing. 290; S. C. 12 B. Moore, 591.

(b) 3rd edit. tit. "Reversion."

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Plowden (a), and 1 *Institute* (b), are referred to in support of that definition. In *Bacon's Abridgment* (c), Lord Chief Baron *Gilbert*, in treating of leases for years, and when they are to take effect as a reversion, namely, when as a future interest, and when neither the one nor the other, says, that this introduces a threefold distinction in the manner of making such leases for years, where there is a prior lease or estate then in being. *First*, when they are made by parol—*Secondly*, when by deed poll—and *Thirdly*, when by indenture or fine. That, as to the *first*, if one make a lease to *A.* for ten years, and the same day make a parol lease to *B.* for ten years, of the same lands, this second lease is absolutely void. But if such second lease had been made for twenty years, then it had been good, as a future *interesse termini*, for the last ten years, and void for the first ten years. But *secondly*, if such second lease had been made by deed poll, then it might well enure as a grant of the reversion, and draw after it the rents and services of the first lessee, if he would consent to attorn; and, by consequence, whenever the first lease determined by surrender, forfeiture, or otherwise, such second lessee having the immediate reversion, must come in for the residue of his term. But if such second lease by deed poll had been for twenty years, then, with attornment, this would be a good grant of the reversion, presently to take effect in possession, whenever the first lease determined." Here, attornment is out of the question; and, in *Sheppard's Touchstone*, it is said (d)—"If a man have granted a thing once, he cannot afterwards grant it again. But if the first grant be only of part of the thing granted afterwards, or of part of the time only, the second grant will be good for the overplus. So, if the second grant be to begin after the first is determined, it is good." The same principle

(a) Page 160 a.

(b) Page 142.

(c) Tit. "Leases," N.

(d) Page 245.

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was established in *Moore* (a); and, in *Hughes v. Robotham* (b), it was laid down, that if the term in reversion be greater than the term in possession, the lesser will merge in the greater, as ten years may be surrendered, and merge in twelve or fourteen years. In *Preston on Conveyancing* (c), *Watkins's Principles of Conveyancing* by *Morley* and *Coote* (d), and *Platt on Covenants* (e), all the authorities are collected, from which the principle may be deduced, that a lessor or termor for years may grant part of his reversion; and here, all *Bates's* interest did not pass to *Langdon* under the deed poll, but the intermediate period of twenty-one days, reserved by *Bates* to himself, after the expiration of *Meek's* lease, was still subsisting in *Bates*. Although it may be said, that, even if the deed poll granted less than the whole of *Bates's* interest, it granted a concurrent lease commensurate with *Meek's* term, so that *Langdon* took no reversion by which he could distrain upon *Meek*, upon the principle, that where a lessee grants over the whole of his term, he cannot distrain; yet, the authority in support of that position is questionable, as it originates from a passage in the *Year Book* (f), and which is a mere *obiter dictum* of Chief Justice *Fynchden*, who said—"If a man hath a term for years, and grants all his estate of the term rendering certain rent, he cannot distrain if the rent be in arrear;" yet it is followed by a *sed quære*. But, in *Brooke's Abridgment* (g), the *quære* is omitted, and it is thus stated—"Et *ibid* concedit per *Finch* que si homme ad terre par ans, et graunt tout le terme rend rent, il ne poe distrein. In — v. *Cooper* (h), and *Parmenter v. Webber* (i), *Brooke* only is referred to; and the *Year Book*, 43 Edw. 3, pl. 4,

(a) Page 93.

(b) Cro. Eliz. 302.

(c) Vol. 3, pp. 182, 210.

(d) Part 2, pp. 188, 191, 3, 4,
5.

(e) Page 536.

(f) 45 Edw. 3, fol. 8, pl. 10.

(g) Tit. "Dette," pl. 39.

(h) 2 Wils. 375.

(i) 2 B. Moore, 658.

is cited, instead of 45 *Edw. 3*, fol. 8, pl. 10. So, the subsequent case of *Preece v. Corrie* (a) was decided on the authority of — *v. Cooper* and *Parmenter v. Webber*. Here, however, *Bates* had not assigned the whole of his interest to *Langdon*; and, as the reversion of twenty-one days still remained in him (*Bates*) after the expiration of *Meek's* lease, it prevented the deed poll from operating as a merger or extinguishment of the term. In *Matures v. Westwood* (b) it was held, that the assignee of the reversion of a term may take advantage of a covenant against the lessee; and it is a well-known and general principle, that a merger or extinguishment of a term cannot take place, where there is an intermediate interest outstanding, but only in those cases where the possession passes to the immediate lessor. Neither was there a surrender of the term; for, in *Bacon v. Waller* (c), it was adjudged, that if a lessee grants part of his estate to the lessor, by which a reversion continues in himself; as, if a lessee for twenty years grants all his estate to the lessor, except a month or a day at the end of the term, this is not any surrender, because the lessee has a reversion. So, if a man leases for years, the remainder over for years, and after the first termor grants his interest to the lessor, this is no surrender, by reason of the mesne interest of the term in remainder (d). Besides, in this case, if the deed poll be taken to operate as a surrender, it would be expressly contrary to the intention of the parties, which was, that *Langdon* should have the rent reserved from *Meek*; and the deed must be so construed as to carry such intent into effect (e).

Lastly, the case of *Williams v. Bosanquet* (f), in which

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- (a) 2 Moore & Payne, 57; S. C. 5 Bing. 24. and see Perkins, sect. 82.
 (b) Cro. Eliz. 599. (e) Preston on Conveyancing, Vol. 3, pp. 118, 109.
 (c) 1 Rolle's Rep. 388. (f) 3 B. Moore, 500; S. C. 1 Brod. & Bing. 238.
 (d) Brooke's Abr. tit. "Surrender," pl. 52, citing 21 Hen. 3,

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all the previous decisions are collected and commented on by the Court in giving judgment, is decisive to shew, that the defendants are liable to the covenants contained in *Meek's* lease, because they not only received that instrument in pursuance of the assignment, but accepted the deed of assignment also; and as they have retained both these instruments ever since, it is equivalent to their taking possession; for, in that case, it was decided, that covenant for non-payment of rent may be maintained against an assignee of a lease, to whom an assignment had been made by way of mortgage, although he had never entered or taken actual possession;—on the ground, that, by the acceptance of the assignment, the mortgage had become absolute; and here, the defendants accepted what was equivalent or tantamount to a lease, namely, all *Meek's* estate and interest in the premises.

Mr. Serjeant *Taddy*, for the defendants, took three objections to the plaintiff's right to support this action; but, as they are stated, and so fully answered, by the Lord Chief Justice in delivering the judgment of the Court, it is unnecessary to repeat them here.

The Court took time to consider until this Term, and, on this day—

Lord Chief Justice TINDAL delivered judgment as follows:—

This is an action of covenant, in which the plaintiff declares for breaches of the covenants for payment of rent and keeping the premises in repair, contained in an indenture of lease, bearing date the 3rd *November*, 1814, whereby one *David Bates* demised to one *James Meek* certain premises therein described, to hold from the 24th *June* then last past, for the term of twenty-one years wanting twenty-one days.

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The plaintiff, in his declaration, makes title to himself as assignee of the reversion, first, by averring that *Bates*, on the 12th *February*, 1816, by a certain deed poll indorsed on the counterpart of the indenture of demise to *Meek*, assigned to one *John Langdon*, his executors, &c., all his estate and interest, to hold to *Langdon* from thenceforth, for all such time or term therein as in the said counterpart of the said indenture is mentioned; and the declaration then alleges, that *John Langdon*, on the 15th *July*, 1822, by indenture, assigned all his estate, right, title, and interest of and in the demised premises, to the plaintiff, to hold for the term of one whole year; and again, by indenture of the 16th *July*, 1822, assigned to the plaintiff all his estate, right, title, &c., to hold to him, his executors, &c., for all such time or term of years as in the counterpart of the indenture of demise to *Meek* is mentioned, subject to a proviso for making void the same, on payment by *Langdon* to the plaintiff of 700*l.* and interest; and the declaration then alleges, in the usual manner, that all *Meek's* estate and interest came to and vested in the defendants by assignment.

The pleas, from the second to the eighth (both inclusive) state matters in bar, as it is contended, of the plaintiff's right to maintain the action. The ninth denies the liability of the defendants, by traversing that the estate and interest of *Meek* in the premises came to them by assignment. And the two remaining pleas merely deny the breaches of covenant alleged in the declaration.

Now, the facts stated upon the pleadings, in bar of the plaintiff's right of action, are in substance these:—that *John Langdon*, being seised in his demesne as of fee in the premises in question, by indenture of the 5th *July*, 1814, demised them for twenty-one years to *Bates*, who entered and was possessed:—that *Bates*, being so possessed of the premises, by indenture of the 3rd *November*, 1814, (set out on oyer) demised them to *Meek* for

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the residue of his term therein, excepting the last twenty-one days:—that, at the time of the execution of the deed poll of the 12th *February*, 1816, (also set out on oyer), *Langdon* still continued seised in fee of the reversion, expectant on the determination of *Bates's* lease; and that *Bates* did, by the deed poll last referred to, surrender up to *Langdon*, who accepted the same, the next immediate reversion, expectant on the determination of *Meek's* underlease (to which the covenants in his lease were incident), whereby, as it is alleged upon the pleadings, the said immediate reversion became *merged* in *Langdon's* fee.

In the fourth plea, the deed poll is stated according to its terms, and not according to the legal effect which the defendants contend it bears; and it is alleged in that plea, as a legal inference, that all rights of action upon the covenants in the lease of the 3rd *November*, 1814, became thereby *suspended*. To this plea there is a demurrer, and a joinder in such demurrer.

It is obvious, however, there can be no real or substantial distinction between the question raised on such demurrer, and the question upon the special verdict, so far as concerns the legal effect and operation of the deed poll of the 12th *February*, 1816.

The special verdict further finds and sets out, *in hæc verba*, the deeds of the 15th and 16th *July*, 1822, under which the plaintiff derives title in the declaration, and which appear to have been a mortgage in fee by bargain and sale for a year, and release from *Langdon* to the plaintiff; and also a certain assignment of the 19th *October*, 1816, from *Meek* to the defendants, whereby, after reciting the lease from *Bates* to himself, he assigns to the defendants all his estate and interest in the premises, subject to the rent and covenants, upon trust that they should permit *Meek* to occupy and enjoy the premises until demand should be made of payment of the sum of 420*l.* and interest, upon payment of which sum the assignment should be void; and upon

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further trust, that, if default should be made, the defendants might enter and sell and dispose of the term, and pay themselves the said sum of 420*l.*, and all arrears of interest. The special verdict further finds, that no demand had been ever made for payment of the sum of 420*l.* and interest; that *Meek* has continued in possession from the time of executing the assignment; and that the defendants have never entered, nor ever became actually possessed of the premises, or in any manner acted upon the said indenture of the 19th *October*, 1816, otherwise than by receiving that indenture, and the indenture of demise to *Meek*, into their possession, and retaining them ever since.

Upon the whole of this record, three objections have been taken by the defendants against the plaintiff's right to maintain this action—*first*, it is contended that the legal operation of the deed poll of the 12th *February*, 1816, was that of surrendering the immediate reversion expectant on the determination of *Meek's* underlease to *Langdon*, the next reversioner in fee, and thereby merging the smaller in the larger estate—*secondly*, that, at all events, if *Bates's* chattel interest was not merged in the inheritance, it could not pass to *Burton*, the plaintiff, by the deeds of lease and release of the 15th and 16th *July*, 1822, such deeds having their proper operation of conveying the fee—*thirdly*, that the defendants are not such assignees of *Meek's* interest as to become liable to an action upon the covenants in his lease.

The first question is this—what is the legal effect and operation of the deed poll? Looking at the relation of the parties, *Bates* the lessee, and *Langdon* the lessor, no doubt can be raised but that it was the object, and the sole object and intention of the grant, to assign to *Langdon* the improved rent arising from *Meek's* underlease. The improved rent was incident to the reversion of twenty-one days, which *Bates* had reserved to himself out of his entire term. And if that reversion passed by the grant to *Lang-*

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don, it would necessarily defeat the very object of the parties, by merging it in the fee, and thereby depriving the grantee of any action upon the covenants.

The parties, therefore, never could have intended to destroy this immediate reversion; and the question is, whether the deed poll is so worded, as to make it necessary for the Court to construe it as a surrender, and thereby defeat the sole intention of the parties? And we think this deed did not operate as a surrender of *Bates's* reversion of twenty-one days to *Langdon*, the owner of the fee. The deed poll is indorsed on the counterpart of the underlease. It is in terms a grant of "the within written indenture, and the messuage or tenement, with the appurtenances, thereby granted, and all the estate, right, title, interest, &c., of *Bates*—to hold to the said *John Langdon*, his executors, administrators, or assigns, from thenceforth, *for all such time or term therein as within mentioned;*" that is, for the residue of the term of twenty-one years, *minus* twenty-one days, created by the under-lease. There is nothing so necessarily repugnant in the *habendum* to the premises contained in this grant, as to make the *habendum* void; but, taking the premises to contain the grant of the estate or interest which *Bates* then had, the *habendum* restrains the time or term for which such grant was to operate, to the continuance of the lease to *Meek*. The *habendum* in this case restrains the generality of the premises, which is its proper office, according to *Hobart (a)*.

Upon this construction of the deed poll, the intermediate period of twenty-one days reserved by *Bates* to himself remains untouched, and still subsisting in *Bates*. The grant of *Bates's* interest to *Langdon* is a grant for a limited time only, *viz.* for a term co-extensive with *Meek's* underlease. At the moment of the determination of that underlease, all the interest which *Langdon* takes under the

(a) See Hob. Rep. 170, 171.

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deed poll ceases, and *Bates* becomes again entitled to enjoy the estate for the twenty-one days, the residue of the term originally granted to him. If this be the proper construction of the deed poll, it is a necessary consequence that it cannot operate as a surrender of *Bates's* reversion to *Langdon*; and therefore, again, there is no merger of the term of *Bates* in the fee of *Langdon*.

"A surrender is a yielding up of a particular estate for life or for years to him that hath the immediate estate in reversion or remainder, wherein the estate for life or years may drown (a)." Again, it is laid down in *Rolle's Abridgment* (b)—"If a lessee grant part of his estate to his lessor, whereby a reversion continues in himself, this is no surrender; as, if a lessee for twenty years grant all his estate to the lessor, except one year, month, or day, at the end of the term, this is not any surrender, because the lessee hath a reversion."

We therefore think, without referring to other authorities, that this intermediate estate in *Bates*, carved out of the term granted to him by *Langdon*, notwithstanding the deed poll of 1816, still exists as a barrier between *Meek's* term and the inheritance.

But it is objected, on the part of the defendants, that, as the rent and covenants in *Meek's* underlease are incident to *Bates's* immediate reversion, if such reversion does not pass to *Langdon* by the deed poll, the right to sue upon the covenants in the underlease can never be shewn to vest in the plaintiff. But, to this we answer, that it is not necessary that *Langdon* should be the grantee of the whole of *Bates's* reversion, in order to enable him to sue upon those covenants incident to such reversion; but that, if *Bates* grants such reversion to *Langdon* for a limited term only, it will enable *Langdon* so far to sustain the character of reversioner, as that he might either take a surrender from *Meek*, the underlessee, or may maintain an action on the covenants

(a) Co. Litt. 337. b.

(b) Vol. 2, p. 497, line 30.

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incident to the reversion:—for it is laid down by Lord Chief Justice *Popham*, and Mr. Justice *Fennier*, in the case of *Hughes v. Robotham* (a), “that, if lessee for twenty-years makes a lease for ten years, and then grants over the reversion for ten years only, *vis.* no longer than the lease for ten years was to continue, and such lessee for ten years had attorned, then the grantee of the reversion should have the *rent* and *services*, and the grantor the residue of the twenty years; and that the lessee for ten years might surrender to the grantee of the reversion for ten years, and he would thereby have in possession so many years as were to come of his reversion: and, if he had a lesser term in the reversion than the lessee himself had in the possession, it should go to the benefit of the first termor for twenty years, who was his grantor; for the term in possession is quite gone and drowned in the reversion, to the benefit of those who have the reversion thereupon, having regard to their estate in the reversion, and not otherwise.”

Upon the whole, therefore, it appears to us, that the legal operation of the deed poll is that of a grant or demise by *Bates* to *Langdon* of his reversion expectant on *Meek's* under-lease for a term exactly co-extensive with such under-lease; and that such grant or demise has the effect, on the one hand, by preserving the intermediate estate for twenty-one days in *Bates*, so as to prevent a surrender or merger, and, on the other hand, to give to *Langdon*, whilst such grant continues, the right to sue on all the covenants, the same being incident to the immediate reversion.

But it has been contended under this head, that the right to sue for the rent *is suspended*. It is obvious, however, from what has been already stated, that there can be no suspension of *Meek's* rent, if the reversion expectant upon the determination of the under-lease subsists in the grantee of *Bates*, distinct from the ultimate reversion in fee. Sus-

(a) *Popham*, 30; *S. C. Cro. Eliz.* 302.

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pension, which is a partial extinguishment, takes place only where the rent, or other profit *à prendre*, issuing out of the land, comes to him who has possession of the same land for a time only. The rent sought to be recovered in this action is that which is reserved under *Meek's* under-lease: and if either *Bates* or *Langdon* had purchased the term granted by *Meek's* under-lease, the rent in that case would have been suspended during the continuance of such under-lease; for, in that case, there would have been an union of the rent and of the land itself, in the same person. So, if this action had been brought for the rent reserved under *Bates's* lease, there might have been a question, whether his rent was not suspended until the term granted by him to *Langdon* had ceased; that is, until the arrival of the last twenty-one days of his original term. But no such question can arise here. We come, therefore, to the second objection raised by the defendants, *vis.* the operation of the deeds of lease and release of the 15th and 16th *July*, 1822.

The second objection is this, that the chattel interest so granted by *Bates* to *Langdon* did not pass from *Langdon* to the plaintiff by the lease and release of the 15th and 16th *July*, 1822. The question is, whether this conveyance, which undoubtedly carried the fee from *Langdon* to the plaintiff, and which was intended by the parties so to do, can by law have the additional operation of conveying a separate chattel interest in the same premises to the grantee?

That the intention of the parties, independent of the deed itself, was to convey to the plaintiff all the interest, of whatever kind, which *Langdon* had in the premises, cannot be doubted. At the time of executing the deed of release, *Meek* was the tenant in possession; *Langdon* was possessed of the immediate reversion for the residue of a term of twenty-one years wanting twenty-one days, with remainder to *Bates* for twenty-one days, and reversion to *Langdon* in fee. Thus circumstanced, his object was, to give

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a good and valid security to the plaintiff for the repayment of 700*l.* and interest, by a mortgage in fee. But the only mode of making this security available for the next thirteen years, was, by granting his chattel interest to the mortgagee; for, without it, he could have no remedy for rent or repairs against the occupier of the premises. That the deed of release, by proper words of recital, and apt terms of grant, might have conveyed this chattel interest, as well as released the fee, is admitted by the defendants. The only question therefore is, whether the words of the release are sufficiently large to carry into effect this, the object and intent of the parties? Now, after granting the messuage, which is described as being in the occupation of *Meek*, the deed of release contains the terms, "the reversion and reversions, yearly and other rents, issues, and profits, and all the estate, right, title, interest, use, trust, possession, property, claim and demand whatsoever, of, in, and to the premises." Under these words, we think the chattel reversion expectant on *Meek's* term may well pass to the plaintiff *Burton*, and vest in him, whilst the fee passes to him and his heirs. The general rule is, that deeds are to be construed, if possible, so as to effectuate the intent of the parties (*a*); and no authority has been brought before us, to shew that where a double purpose is intended, and the words are large enough, such double purpose may not be carried into effect. And if the chattel interest of which *Langdon* was possessed, passed by grant or assignment to the plaintiff by the deed of release, as we think it did, then no just exception could be taken to the mode in which it is set out in the declaration; for the statement in the declaration of the lease for a year is altogether nugatory, and may be rejected as surplusage, and the conveyance of

(*a*) See the various instances in Sheppard's Touchstone, p. 87 *et seq.*; and Willes' Rep. 327.

the chattel interest will then stand upon the release alone, operating as a grant of this interest to the releasee.

The only remaining ground of objection made by the defendants is, that they are not such assignees of *Meek's* lease as to make them liable to the covenants therein contained. But, upon this point, the case of *Williams v. Bosanquet* (a), seems conclusive against the defendants. The indenture of lease granted by *Bates* to *Meek* having been received by the defendants in pursuance of the assignment of the 19th October, 1816, and also the deed of assignment itself, and having been retained by them ever since, are, according to that case, equivalent to taking possession; and if they have been legally possessed, the trusts of the deed, which are created for their own benefit, cannot affect their legal liability as assignees.

We therefore think there must be judgment for the plaintiff, as well upon the special verdict, as upon the demurrer to the fourth plea.

Judgment for the plaintiff.

(a) 3 Brod. & Bing. 238; S. C. 3 B. Moore, 500.

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LONERGAN and Another v. The ROYAL EXCHANGE ASSURANCE COMPANY.

Monday,
June 13th.

THE Prothonotary having refused to allow the expenses claimed by the plaintiffs for bringing over a captain of a ship from the *Havannah* to be examined as a witness for

A foreigner and captain of a vessel, on being required to come to this country to give evidence for the

plaintiffs in a particular cause, refused to do so unless he were compensated for his loss of time, which the plaintiffs' agent abroad promised him should be done:—*Held*, that he was entitled to have a reasonable sum allowed him by way of compensation for such loss.

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them in an action brought against the defendants to recover an average loss, the question being, whether the ship insured by the company was sea-worthy or not at the time she sailed from a foreign port; and the Prothonotary having also refused to allow the expenses incurred by the detention of the witness in this country, and his return home, the Court directed him to review his taxation (*a*). The plaintiffs originally claimed 533*l.* 14*s.* for the captain's expenses and loss of time during his attendance in this country as a witness, namely, from the 17th *September*, 1828, to the 17th *February*, 1830, on which day the defendants paid the plaintiffs the amount of their claim, without proceeding to trial. On the second taxation before the Prothonotary, the plaintiffs claimed 212*l.* 10*s.* as a compensation for the captain's loss of time, at the rate of 12*l.* 10*s.* *per* month; which the Prothonotary having refused to allow—

Mr. Serjeant *Wilde*, on a former day in this term, obtained a rule *nisi* that the Prothonotary might again review his taxation. The application was founded on an affidavit, which stated, that the captain was an *American* by birth, and that he was at *Matangas* when the application was made to him to come to this country to be examined as a witness on the trial of this cause on behalf of the plaintiffs, and that before he would consent to do so, their agent undertook that he should be paid for his loss of time in going to *England*, remaining there, and returning back to *Matangas*, and also for his board, lodging, and all other incidental expenses during his stay in this country.

Mr. Serjeant *Taddy* and Mr. Serjeant *Spankie* now shewed cause.—The Prothonotary has not only exercised

(*a*) See *ante*, p. 447.

a sound discretion in not allowing the compensation claimed by the plaintiffs for the witness's loss of time, but he was justified in the refusal, by several decided cases. *Moor v. Adam* (a) narrowed the rule before adopted as to compensation to witnesses for loss of time; and there such compensation was not allowed to merchants who came from *Alicant* for the express purpose of being examined as witnesses; and, in *Lowry v. Doubleday*, Lord *Ellenborough* said (b)—“That he believed the practice had been to make allowance to medical men and attorneys, but not to others.” In *Severn v. Olive* (c), where the Prothonotary allowed a compensation for loss of time to scientific and professional persons in making experiments with a view of ascertaining the increased risk or advantage of boiling sugar by means of heated oil, the Court directed him to review his taxation; on the ground, that no such allowance or compensation ought to have been made. There, too, one of the witnesses, who was examined, was a lecturer at the University of *Glasgow*, and was brought over from thence, on three different occasions, to attend the trial; and here, the mere circumstance that the witness was a foreigner makes no difference, as in that case he resided out of the jurisdiction of the Court. In *Lopes v. De Tastet* (d), the Prothonotary refused to allow the expenses of the return home of several foreign witnesses, who were domiciled in this country; and the Court said that he had exercised a sound discretion in so doing. Although it is stated in the marginal note to the case of *Tremain v. Barrett* (e), that, if a witness is *bond fide* sent for from a foreign country for the sake of his testimony in an intended action, though the writ is not sued out until after his arrival, the plaintiff is entitled in that

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(a) 5 Mau. & Selw. 156.

(b) Id. 159, n.

(c) 6 B. Moore, 235.

(d) 7 B. Moore, 126.

(e) 6 Taunt. 88.

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cause to the costs of bringing him over, his subsistence, and compensation for his loss of time spent here pending the suit, for the purposes thereof, and to the costs of his return; yet Lord Chief Justice *Gibbs*, in delivering his judgment, confined himself to the costs of the witness's detention here and his return home; and that is consistent with the report of that case in *Marshall* (a). So, in *Tremain v. Faith* (b), the only costs allowed were those of bringing the witness over and sending him back. Besides, those cases were decided before that of *Severn v. Olive*, which has established the principle, that compensation for loss of time must be limited to persons in the legal and medical professions. In *Hagedorn v. Allnutt* (c), it was held, that the costs of a witness coming from beyond seas were to be allowed only from his coming within the jurisdiction of this Court; and although, in the subsequent case of *Cotton v. Witt* (d), it was held, that the costs of bringing over such a witness were to be allowed in future, but not the costs of his return; yet all the cases are silent as to a compensation to be made to him for his loss of time; and, in *Sturdy v. Andrews* (e), the Court allowed the costs of detaining a foreigner in this country to give evidence upon a trial, which costs were computed from the day of suing out the writ to the day of trial; and the practice of the Court of *King's Bench* was said to be the same in that respect.

Mr. Serjeant *Wilde*, in support of his rule.—No general rule can be laid down as to the allowance of costs to a witness coming from abroad for the express purpose of giving his testimony in a Court of law in this country, for such costs must vary according to the circumstances of

(a) Vol. 1, p. 463.

(b) 6 Taunt. 92; S. C. 1 Marsh.

563.

(c) 3 Taunt. 379.

(d) 4 Taunt. 55.

(e) Id. 697.

each particular case; and if no compensation were made to a witness for his loss of time in a case like the present, he being a foreigner, and master of a vessel, it would operate as a denial of justice, for such witness could not be subpoenaed, he being without the jurisdiction of the Court; and it is sworn that he refused to come over, till the plaintiffs' agent undertook that he should be paid for his loss of time, and all other incidental expenses. In *Moor v. Adam*, neither of the witnesses gave any evidence relative to the assault which was the ground-work of the action; and Lord *Ellenborough* said—"I do not think that the Court is called upon to lay down any rule peremptorily, that in no case whatever where a witness comes from abroad there shall be an allowance made to him for loss of time." In *Severn v. Olive*, the only question for the consideration of the Court was, whether expenses incurred in making experiments, and a compensation to scientific persons who were employed in making them, *quasi* loss of time, should be allowed. Here, however, as the only question was, whether the ship were seaworthy or not, the captain was the most material witness for the plaintiffs; and, as he was a foreigner, and had no other business in this country but to attend at the trial, he was clearly entitled to a compensation for his loss of time; and the true distinction is between persons who are resident abroad, who cannot be compelled to attend, and those who live within the jurisdiction of the Court, and may be required to attend under a *subpœna*.

Lord Chief Justice TINDAL.—We are not called upon to lay down a general rule, that, in all cases where a party is obliged to have recourse to a foreign witness, he may, if he succeed, call on the adverse party to compensate the witness for his loss of time. Still less are we called upon to say, that, in any such case, the unsuccessful party is

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bound to pay a compensation to the full extent claimed by his adversary. It must be ascertained what is a reasonable sum for the unsuccessful party to pay. If there had been any general rule upon the subject, I admit that this case ought to be governed by it; but, from what Lord *Ellenborough* said in *Moor v. Adam*, it appears that there is no such rule, for his Lordship said—"That it did not appear upon the affidavits to be a case in which such an allowance ought to be made;" and it was sworn that neither of the witnesses gave any evidence relative to the assault which was committed at *Alicant*, and which was the sole ground of the plaintiff's action. The question then is, whether a foreigner, and captain of a vessel, on being required to come to this country to give evidence in a particular cause, and who refused to do so till the plaintiffs' agent promised to compensate him for his loss of time, and to pay all his expenses, such costs ought not to be paid by the defendants, who, without proceeding to trial, paid the plaintiffs the amount of their demand? I am of opinion that they ought. The case of *Severn v. Olive* is distinguishable; and although one of the witnesses came from *Scotland*, yet the claim made was not for mere loss of time, but for expenses incurred in making experiments to qualify himself as a witness in the particular cause in which his testimony was required. It has but lately been laid down as a general principle, that where witnesses attend under a *subpoena*, a compensation for loss time is only allowed on taxation to attorneys and medical men:—but I do not think that that principle is founded on a reasonable ground, or that, if it were to undergo revision, it would stand the test of examination; for I cannot see any true distinction to be drawn between persons in those professions, and surveyors or engineers, or other scientific men, who gain their livelihood by their own skill and exertions. But that rule does not apply to the case of a foreigner,

over whom the Court has no power or jurisdiction; and he may impose any reasonable terms on the party who requires his attendance, and may refuse to come to this country if the terms he proposes are not acceded to; and if the party or his agent agree to his proposals, I see no reason why they should not be enforced. I therefore think, that, under all the circumstances, this case should go back to the Prothonotary, and that he ought to allow a reasonable sum by way of compensation for the loss of time of the witness, but not to the amount claimed by the plaintiffs.

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Mr. Justice PARK.—Although, in *Lowry v. Doubleday*, Lord *Ellenborough* said—"That he believed the practice had been to make allowance to medical men and attorneys, but not to others;" yet, in *Moor v. Adam*, he said—"He did not think that the Court was called upon to lay down any rule peremptorily, that, in no case whatever, where a witness comes from abroad, there shall be an allowance made to him for loss of time; and that, upon the affidavits, the case before him did not appear to be one in which such an allowance ought to be made;" and he expressly abstained from laying down any general rule. In *Severn v. Olive*, although one of the witnesses came from *Scotland*, yet he claimed a compensation for time employed by him in making experiments in order to qualify himself to answer certain questions which might be put to him as to a new process for boiling sugar by means of heated oil. I agree with my Lord Chief Justice, that, if it were established as a general principle, that compensation for loss of time should be made only to members of the legal and surgical professions, it would operate with great hardship on scientific persons and others in similar stations in life; for time to a poor man is equally valuable, if not of greater importance than to an attorney. But the question is, whether this case is not distinguishable, or whether or not the

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circumstances are such as to take it out of that rule. The commission to examine witnesses at the *Havannah* was sued out by the defendants; and although, by the order of the Court of *Exchequer*, the plaintiffs had the liberty of cross-examining the captain, yet they might have preferred an examination in open Court; and, as the witness refused to come to this country unless the plaintiffs' agent would consent to pay him for his loss of time, and to which he assented, I think the plaintiffs are entitled to have a reasonable compensation allowed them. Without, therefore, infringing upon or impugning the general rule, I am of opinion that the Prothonotary ought to review his taxation, and exercise his discretion as to the reasonableness of the charge made by the plaintiffs for the witness's loss of time.

Mr. Justice GASELEE.—Although I have always understood it to be a general rule not to allow a compensation for loss of time to persons who may be called as witnesses, except medical men and attorneys; yet it appears to me that that rule ought not to be applied to the case of a foreigner coming from abroad, and who resides out of the jurisdiction of the Court. I am not satisfied with the reports of the cases of *Tremain v. Barrett*, and *Tremain v. Faith*, and they appear to be somewhat contradictory. The captain or master of a vessel is generally a person of character and reputation, and his occupation is of equal importance with that of a medical man. Indeed, the loss of time to the one may be far more serious than to the other; and here, the witness refused to come to this country till the plaintiffs' agent consented to make an allowance for his loss of time, as well as all other incidental expenses, and by which the plaintiffs were bound.

Mr. Justice BOSANQUET.—As the question is not what the general rule ought to be, but what it is, I have felt some doubt whether the circumstances of this case are

such as to form an exception to that rule. I thought it applied equally to the case of a foreigner as to a witness who had been regularly *subpœnaed*; but I agree with the Court, that, in this particular instance, a reasonable allowance should be made. The rule, therefore, for the Prothonotary to review his taxation, must be made—

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Absolute.

REGULÆ GENERALES.

Practice.

BAIL.

IT IS ORDERED—1. That a defendant may justify bail at the same time at which they are put in, upon giving four days' notice for that purpose, before eleven o'clock in the morning, and exclusive of *Sunday*. That, if the plaintiff is desirous of time to inquire after the bail, and shall give one day's notice thereof as aforesaid to the defendant, his attorney, or agent, as the case may be, before the time appointed for justification, stating therein what further time is required, such time not to exceed three days in the case of town bail, and six days in the case of country bail, then (unless the Court or a Judge shall otherwise order) the time for putting in and justifying bail shall be postponed accordingly, and all proceedings shall be stayed in the mean time.

Bail may justify at the same time they are put in, upon giving four days' notice. Time to inquire after bail.

2. And it is further ordered, That every notice of bail shall, in addition to the descriptions of the bail, mention the street or place, and number (if any), where each of the bail resides, and all the streets or places, and numbers (if any), in which each of them has been resident at any time

Form of notice of bail.

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Costs of opposition, where the notice is accompanied by an affidavit of the bail.

Where a day's notice of exception not given.

within the last six months, and whether he is a house-keeper or freeholder (*a*).

3. And it is further ordered, That, if the notice of bail shall be accompanied by an affidavit of each of the bail, according to the form hereto subjoined (*b*), and if the plaintiff afterwards except to such bail, he shall, if such bail are allowed, pay the costs of justification (*c*); and, if such bail are rejected, the defendant shall pay the costs of opposition, unless the Court or a Judge thereof shall otherwise order (*d*).

4. And it is further ordered, That, if the plaintiff shall not give one day's notice of exception to the bail by whom

(*a*) In *Higgs's* case, Dowl. Pr. Cas. 124, bail were opposed on the ground that the notice of justification did not state the residence of the bail during the preceding six months; but Mr. Justice *Little-dale* held this not to be necessary, where the residence was mentioned in the notice of bail, in accordance with the above rule.

If a bail has two places of residence, it is only necessary, under this rule, to mention one of them in the notice. *Per* Mr. Justice *J. Parke*, *Anonymous*, Dowl. Pr. Cas. 159. Neither is it necessary, affirmatively to state in the notice, that the bail has resided at the place of which he is described for the last six months. *Anonymous*, Dowl. Pr. Cas. 160.

An omission to describe the bail as householders or freeholders does not authorize the plaintiff to take an assignment of the bail bond. The objection should be made when the bail come up. *Bell v. Foster*, 8 Bing. 334.

(*b*) *Vide, post*, p. 818.

(*c*) In an *Anonymous* case in Dowl. Pr. Cas. 126, bail were opposed on the ground that the notice of bail did not state that the bail were housekeepers or freeholders. Time for inquiry was given, and the bail ultimately justified. Mr. Justice *Little-dale* refused to allow the defendant the costs of justification.

Where the property of which the bail in his affidavit describes himself possessed was insufficient, he was not permitted to justify, without payment by the defendant of the costs of the opposition, although shewn to be possessed of sufficient other property. *Jackson's* case, Dowl. Pr. Cas. 173; *S. P. Hemming v. Blake*, *Ibid.* 179.

(*d*) Where bail were opposed (unsuccessfully) on the ground of their being gaming-house keepers, and consequently of infamous character, and liable to penalties, Mr. Justice *Patterson* allowed the defendant the costs of the justification. *Anonymous*, Dowl. Pr. Cas. 160.

such affidavit shall have been made, the recognizance of such bail may be taken out of Court without other justification than such affidavit.

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5. And it is further ordered, That the bail of whom notice shall be given, shall not be changed without leave of the Court or a Judge.

Bail not to be changed without leave.

PARTICULARS OF DEMAND.

6. And it is further ordered, That, with every declaration, if delivered, or with the notice of declaration, if filed, containing counts in *indebitatus assumpsit*, or debt on simple contract, the plaintiff shall deliver full particulars of his demand under those counts, where such particulars can be comprised within three folios; and, where the same cannot be comprised within three folios, he shall deliver such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios. And, to secure the delivery of particulars in all such cases, it is further ordered, That, if any declaration or notice shall be delivered without such particulars, or such statement as aforesaid, and a Judge shall afterwards order a delivery of particulars, the plaintiff shall not be allowed any costs in respect of any summons for the purpose of obtaining such order, or of the particulars he may afterwards deliver. And that a copy of the particulars of the demand, and also particulars (if any) of the defendant's set-off, shall be annexed by the plaintiff's attorney to every record, at the time it is entered with the Judge's marshal (a).

Particulars of demand, in what cases and when to be delivered.

Consequence of non-delivery.

Copy of particulars of demand, or set-off, to be annexed to the record.

(a) See *Macarthy v. Smith*, 8 Bing. 145, where it was held, that, when the bill of particulars is appended to the record, pursuant to this rule, it is not necessary to prove the delivery of it to the defendant.

Judgment of *non pros.* cannot be signed for omission to deliver particulars pursuant to a Judge's order. *Sutton v. Clark*, 8 Bing. 165.

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Where declaration delivered on or before the last day of term, no imparlance allowed.

IMPARLANCE.

7. And it is further ordered, That, upon every declaration delivered or filed on or before the last day of any term, the defendant, whether in or out of any prison, shall be compellable to plead as of such term, without being entitled to any imparlance (a).

NON PROS.

No judgment of *non pros.* to be signed until four days after demand of declaration, &c.

8. And it is further ordered, That no judgment of *non pros.* shall be signed for want of a declaration, replication, or other subsequent pleading, until four days next after a demand thereof shall have been made in writing, upon the plaintiff, his attorney, or agent, as the case may be.

JUDGE'S SUMMONS.

Only two summonses necessary before Judge's order.

9. And it is further ordered, That, hereafter, it shall not be necessary to issue more than two summonses for attendance before a Judge upon the same matter; and the party taking out such summonses shall be entitled to an order on the return of the second summons, unless cause is shewn to the contrary.

DECLARATION DE BENE ESSE.

Declaration *de bene esse* not to be delivered until six days after service of process or arrest.

10. And it is further ordered, That no declaration *de bene esse* shall be delivered until the expiration of six days from the service of the process, in the case of process which is not bailable, or until the expiration of six days from the time of the arrest, in case of bailable process; and such six days shall be reckoned inclusive of the day of such service or arrest.

DECLARATIONS IN EJECTMENT.

Declarations in ejectment may be served before the first day of term.

11. And it is further ordered, That declarations in ejectment may be served before the first day of any term, and thereupon the plaintiff shall be entitled to judgment against

(a) See *Edensor v. Hoffman*, 2 Crompt. & Jerv. 140.

the casual ejector, in like manner as upon declarations served before the essoign, or first general return-day.

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TAXATION OF COSTS.

12. And it is further ordered, That, before taxation of costs, one day's notice shall be given to the opposite party.

Notice of taxation of costs.

RULES TO PLEAD.

13. And it is further ordered, That no rule to shew cause, or motion, shall be required, in order to obtain a rule to plead several matters, or to make several avowries or cognizances; but that such rules shall be drawn up upon a Judge's order, to be made upon a summons, accompanied by a short abstract or statement of the intended pleas, avowries, or cognizances. Provided that no summons or order shall be necessary in the following cases, that is to say, where the plea of *non assumpsit*, or *nil debet*, or *non detinet*, with or without a plea of tender as to part, a plea of the statute of limitations, set-off, bankruptcy of the defendant, discharge under an insolvent act, *plene administravit*, *plene administravit præter*, infancy, and coverture, or any two or more of such pleas, shall be pleaded together; but, in all such cases, a rule shall be drawn up by the proper officer, upon the production of the engrossment of the pleas, or a draft or copy thereof.

Rules to plead double, how obtained.

In what cases not necessary.

COMMENCEMENT OF THE RULES.

14. And it is further ordered, that these rules shall take effect on the first day of next *Michaelmas* Term, except the rule as to the service of declarations in ejectment, which shall take effect from the 25th day of *October* next.

Rules, when to take effect.

TENTERDEN,
N. C. TINDAL,
LYNDHURST,
J. BAYLEY,
J. A. PARK,
J. LITTLEDALE,
S. GASELEE,

J. VAUGHAN,
J. PARKE,
W. BOLLAND,
J. B. BOSANQUET,
W. E. TAUNTON,
E. H. ALDERSON,
J. PATTESON.

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FORM OF AFFIDAVIT OF JUSTIFICATION OF BAIL (a).

In the ———

Between, &c.

Form of affidavit of justification of bail.

A. B., one of the bail for the above-named defendant, maketh oath and saith, that he is a housekeeper [or "freeholder," *as the case may be*], residing at [*describing particularly the street or place, and number, if any*]; that he is possessed of property to the amount of £—— [*the amount required by the practice of the Courts*], over and above all his just debts [*if bail in any other action, add, "and every other sum for which he is now bail"*]; that he is not bail for any defendant except in this action [or, *if bail in any other action or actions, add, "except for C. D., at the suit of E. F., in the Court of ———, in the sum of £——; for G. H., at the suit of I. K., in the Court of ———, in the sum of £——;" specifying the several actions, with the Courts in which they are brought, and the sums in which the deponent is bail*]; that the deponent's property, to the amount of the said sum of £—— [*"and, if bail in any other action or actions, "of all other sums for which he is now bail as aforesaid"*], consists of [*here specify the nature and value of the property in respect of which the bail proposes to justify, as follows:—"stock in trade, in his business of ———, carried on by him at ———, of the value of £——; of good book debts owing to him, to the amount of £——; of furniture in his house at ———, of the value of £——; of a freehold or leasehold farm, of the value of £——, situate at ———, occupied by ———; of a dwelling-house, of the value of £——, situate at ———, occupied by ———:" (b) or of other property, particularising*

(a) Referred to *ante*, p. 814.

(b) It is not enough that the bail should describe himself as possessed of "money in the funds,"

without stating in what fund it is. *Per Mr. Justice J. Parke, Anonymous, Dowl. Pr. Cas. 159.*

In the case of bail by affidavit,

each description of property, with the value thereof]: and that the deponent hath, for the last six months, resided at ——— [*describing the place or places of such residence*] (a).

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Sworn, &c.

Pleading.

WHEREAS declarations in actions upon bills of exchange, promissory notes, and the counts usually called the common counts, occasion unnecessary expense to parties, by reason of their length, and the same may be drawn in a more concise form: Now, for the prevention of such expense—

IT IS ORDERED, That, if any declaration in *assumpsit*, hereafter filed or delivered, and to which the plaintiff shall not be entitled to a plea as of the term, being for any of the demands mentioned in the schedule of forms and directions annexed to this order, or demands of a like nature, shall exceed in length such of the said forms set forth or directed in the said schedule, as may be applicable to the case; or, if any declaration in debt to be so filed or delivered for similar causes of action, and for which the action of *assumpsit* would lie, shall exceed such length, no costs of the excess shall be allowed to the plaintiff if he succeed in the cause; and such costs of the excess as have been incurred by the defendant shall be taxed and allowed to the defendant, and be deducted from the costs allowed to the plaintiff.

And it is further ordered, That, on the taxation of costs

the notice must be accompanied either by the original affidavit, or by a copy purporting upon the face of it to be a copy; otherwise costs of justification will not be allowed. *West v. Williams*, Dowl.

Pr. Cas. 162.

(a) Though the above form be several, it seems that both the bail may join in one affidavit. See *Anonymous*, Dowl. Pr. Cas. 115.

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as between attorney and client, no costs shall be allowed to the attorney in respect of any such excess of length; and, in case any costs shall be payable by the plaintiff to the defendant on account of such excess, the amount thereof shall be deducted from the amount of the attorney's bill.

TENTERDEN,
 N. C. TINDAL,
 LYNTHURST,
 J. BAYLEY,
 J. A. PARK,
 J. LITTLEDALE,
 S. GASELEE,

J. VAUGHAN,
 J. PARKE,
 W. BOLLAND,
 J. B. BOSANQUET,
 W. E. TAUNTON,
 E. H. ALDERSON,
 J. PATTESON.

SCHEDULE OF FORMS.

Counts on Promissory Notes.

Payee or indorsee
 against maker.

FOR THAT WHEREAS the defendant, on the — day of —, in the year of our Lord —, at London [or, “in the county of —”], made his promissory note in writing, and delivered the same to the plaintiff, and thereby promised to pay to the plaintiff £—, — days [“weeks” or “months”] after the date thereof [*or as the fact may be*], which period has now elapsed [*or, if the note be payable to A. B., “and then and there delivered the same to A. B., and thereby promised to pay to the said A. B., or order, £—, — days (‘weeks’ or ‘months’) after the date thereof (or as the fact may be), which period has now elapsed”]*]; and the said A. B. then and there indorsed the same to the plaintiff, whereof the defendant then and there had notice, and then and there, in consideration of the premises, promised to pay the amount of the said note to the plaintiff, according to the tenor and effect thereof.

Indorsee against
 payee.

WHEREAS one C. D., on the — day of —, in the

year of our Lord —, at *London* [*or*, “in the county of —”], made his promissory note in writing, and thereby promised to pay the defendant, or order, £—, — days [“weeks” or “months”] after the date thereof [*or as the fact may be*], which period has now elapsed; and the defendant then and there indorsed the same to the plaintiff, [*or*, “and the defendant then and there indorsed the same to X. Y., and the said X. Y. then and there indorsed the same to the plaintiff”]; and the said C. D. did not pay the amount thereof, although the same was there presented to him on the day when it became due: of all which the defendant then and there had due notice.

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WHEREAS one C. D., on —, at *London* [*or*, “in the county of —”], made his promissory note in writing, and thereby promised to pay X. Y., or order, £—, — days [“weeks” or “months”] after the date thereof [*or as the fact may be*], which period has now elapsed, and then and there delivered the said note to the said X. Y., and the said X. Y. then and there indorsed the same to the defendant, and the defendant then and there indorsed the same to the plaintiff, [*or*, “and the defendant then and there indorsed the same to Q. R., and the said Q. R. then and there indorsed the same to the plaintiff”]; and the said C. D. did not pay the amount thereof, although the same was there presented to him on the day when it became due: of all which the defendant then and there had due notice.

Indorsee against indorser.

Counts on Inland Bills of Exchange.

WHEREAS the plaintiff, on —, at *London* [*or*, “in the county of —”], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the plaintiff £—, — days [“weeks” or “months”] after the date [*or* “sight”] thereof, which period has now elapsed; and the defendant then

Drawer (being also payee) against acceptor.

1831.
 REG. GEN.

and there accepted the said bill, and promised the plaintiff to pay the same according to the tenor and effect thereof, and of his said acceptance thereof; but did not pay the same when due.

Drawer (not being the payee) against acceptor.

WHEREAS the plaintiff, on —, at *London* [or, “ in the county of — ”], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to *O. P.*, or order, £—, — days [“ weeks ” or “ months ”] after the date [or “ sight ”] thereof, which period has now elapsed, and then and there delivered the same to the said *O. P.*; and the said defendant then and there accepted the same, and promised the plaintiff to pay the same according to the tenor and effect thereof, and of his acceptance thereof; yet he did not pay the amount thereof, although the said bill was there presented to him on the day when it became due; and thereupon the same was then and there returned to the plaintiff: of all of which the defendant then and there had notice.

Indorsee against acceptor.

WHEREAS one *E. F.*, on —, at *London* [or, “ in the county of — ”], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the said *E. F.* [or, “ to *H. G.* ”] or order, £—, — days [“ weeks ” or “ months ”] after sight [or “ date ”] thereof, which period is now elapsed; and the defendant then and there accepted the said bill, and the said *E. F.* [or, “ the said *H. G.* ”] then and there indorsed the same to the plaintiff [or, “ and the said *E. F.*,” or “ the said *H. G.*,” then and there indorsed the same to *K. J.*, and the said *K. J.* then and there indorsed the same to the plaintiff]: of all which the defendant then and there had due notice, and then and there promised the plaintiff to pay the amount thereof, according to the tenor and effect thereof, and of his acceptance thereof.

Payee against acceptor.

WHEREAS one *E. F.*, on —, at *London* [or, “ in the

county of ——"], made his bill of exchange in writing, and directed the same to the defendant, and thereby required the defendant to pay to the plaintiff £——, —— days ["weeks" or "months"] after the sight [or "date"] thereof, which period has now elapsed; and the defendant then and there accepted the same, and promised the plaintiff to pay the same, according to the tenor and effect thereof, and of his acceptance thereof.

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WHEREAS the defendant, on ——, at *London* [or, "in the county of ——"], made his bill of exchange in writing, and directed the same to *J. K.*, and thereby required the said *J. K.* to pay to the plaintiff £——, —— days ["weeks" or "months"] after the sight [or "date"] thereof, and then and there delivered the same to the said plaintiff; and the same was then and there presented to the said *J. K.* for acceptance, and the said *J. K.* then and there refused to accept the same: of all which the defendant then and there had due notice.

Payee against
drawer on
non-acceptance.

WHEREAS the defendant, on ——, at *London* [or, "in the county of ——"], made his bill of exchange in writing, and directed the same to *J. K.*, and thereby required the said *J. K.* to pay to the order of the said defendant £——, —— days ["weeks" or "months"] after the sight [or "date"] thereof, and the said defendant then and there indorsed the same to the plaintiff [or, "and the said defendant then and there indorsed the same to *L. M.*, and the said *L. M.* then and there indorsed the same to the plaintiff"]; and the same was then and there presented to the said *J. K.* for acceptance, and the said *J. K.* then and there refused to accept the same: of all which the defendant then and there had due notice.

Indorsee against
drawer, on non-
acceptance.

WHEREAS one *N. O.*, on ——, at *London* [or, "in the county of ——"], made his bill of exchange in writing,

Indorsee against
indorser, on
non-acceptance.

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and directed the same to *P. Q.*, and thereby required the said *P. Q.* to pay to his order £—, — days ["weeks" or "months"] after the sight [or "date"] thereof, and the said *N. O.* then and there indorsed the said bill to the defendant [or, "to *R. S.*," and the said *R. S.* then and there indorsed the same to the defendant"], and the defendant then and there indorsed the same to the plaintiff; and the same was then and there presented to the said *P. Q.* for acceptance, and the said *P. Q.* then and there refused to accept the same: of all which the defendant then and there had due notice.

Indorsee against
payee, on non-
acceptance.

WHEREAS one *N. O.*, on —, at *London* [or, "in the county of —"], made his bill of exchange in writing, and directed the same to *P. Q.*, and thereby required the said *P. Q.* to pay to the defendant, or order, £—, — days ["weeks" or "months"] after the sight [or "date"] thereof, and then and there delivered the same to the defendant; and the defendant then and there indorsed the said bill to the plaintiff [or, "to *R. S.*," and the said *R. S.* then and there indorsed the same to the plaintiff"]; and the same was then and there presented to the said *P. Q.* for acceptance, and the said *P. Q.* then and there refused to accept the same: of all which the defendant then and there had due notice.

GENERAL DIRECTIONS.

1. *On Bills payable after Date.*

Where the action is brought after the expiration of the time of payment.

IF the declaration be against any party to the bill except the drawee or acceptor, and the bill be payable at any time after date, and the action not brought till the time is expired, it will be necessary to insert, as in declarations on promissory notes, immediately after the words denoting the time appointed for payment, the following

words, *viz. which period has now elapsed*; and, instead of averring that the bill was presented to the drawee for acceptance, and that he refused to accept the same, to allege that the drawee [naming him] *did not pay the said bill, although the same was there presented to him on the day when it became due.*

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2. On Bills payable after Sight.

And if the declaration be against any party except the drawee or acceptor, and the bill be payable at any time after sight, it will be necessary to insert, after the words denoting the time appointed for payment, the following words, *viz. and the said drawee [naming him] then and there saw and accepted the same, and the said period has now elapsed*; and, instead of alleging that the bill was presented for acceptance and refused, to allege that the drawee [naming him] *did not pay the said bill, although the same was presented to him on the day when it became due.*

3. Bills or Notes payable at Sight.

If a note or bill be payable at *sight*, the form of the declaration must be varied so as to suit the case, which may be easily done.

4. On Foreign Bills.

Declarations on foreign bills may be drawn according to the principle of these forms, with the necessary variations.

COMMON COUNTS.

WHEREAS the defendant, on —, at *London* [*or, Goods sold.* "in the county of —"], was indebted to the plaintiff in £—, for the price and value of goods then and there bargained and sold [*or "sold and delivered"*] by the plaintiff to the defendant, at his request—

And in £—, for the price and value of work then *Work done.*

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REG. GEN.

and there done, and materials for the same provided, by the plaintiff for the defendant, at his request—

Money lent. And in £——, for money then and there lent by the plaintiff to the defendant, at his request—

Money paid. And in £——, for money then and there paid by the plaintiff for the use of the defendant, at his request—

Money received. And in £——, for money then and there received by the defendant for the use of the plaintiff—

Account stated. And in £——, for money found to be due from the defendant to the plaintiff on an account then and there stated between them:

General conclusion.

And whereas the defendant, afterwards, on &c., in consideration of the premises respectively, then and there promised to pay the said several moneys respectively to the plaintiff, on request: Yet he hath disregarded his promises, and hath not paid any of the said moneys, or any part thereof:—To the plaintiff's damage of £——; and thereupon he brings suit, &c.

Directions as to the general conclusion.

If the declaration contain one or more counts against the maker of a note, or acceptor of a bill of exchange, it will be proper to place them first in the declaration; and then in the general conclusion to say—promised to pay the said *last-mentioned several monies respectively*.

AN

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1. In an action on the case for an alleged injury to the plaintiff's reversionary interest in a house, he averred in his declaration that the premises were in the occupation of one *S. P.*, as tenant thereof to the plaintiff. It was proved that the house had been let to *S. P.* by a *cestui que trust*, to whom she had paid rent, the plaintiff being his trustee:—*Held*, to be no variance, as the legal estate was in the plaintiff, and the *cestui que trust* was to be considered as his agent or bailiff. *Vallance v. Savage*, 576

AFFIDAVIT TO HOLD TO BAIL.

1. The affidavit to hold to bail in an action by the payee or indorsee of a bill of exchange, against the drawer, must allege the default of the acceptor. *Buckworth v. Levi*, 23

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AGREEMENT.

See LANDLORD AND TENANT, 4.

1. The plaintiff, a surveyor, was retained by the defendant, to negotiate with the Commissioners of Woods and Forests for the sale to them of certain premises of the defendant, for which he was to receive a commission of *2l. per cent.* "on the sum which might be obtained, either by private treaty, arbitration, or trial by jury." Private treaty proving unavailing, a Jury was impanelled, by whom the value of the property was assessed at 4,000*l.*; but, in consequence of a defect in the defendant's title, arising out of an annuity charged upon part of the premises, which the commissioners required the defendant to buy off, the money was not paid to her, but was placed in the hands of the Accountant-General, to await the adjustment of the difference. The plaintiff was not previously aware of the existence of this charge:—*Held*, that he was, nevertheless, not entitled to his commission until the money awarded was *actually received* by the defendant. *Bull v. Price*, 2

2. By agreement between the plaintiff and defendant, the former engaged

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ed to let to the latter certain land, upon which the defendant engaged to build certain houses, the plaintiff to lend him 6,000*l.* for that purpose, which sum the defendant was not to be called upon to pay before the 24th *June*, 1829; and the defendant agreed to convey the houses to the plaintiff, when completed, as a security for the advance. In pursuance of this agreement, the plaintiff advanced to the defendant 1,168*l.* 19*s.* On the completion of six of the houses, the defendant, at the request of the plaintiff, discontinued the building. After the 24th *June*, 1829, the plaintiff brought *indebitatus assumpsit* for the 1,168*l.* 19*s.*—*Held*, that the action was maintainable, the special contract being rescinded by the consent of the parties. *James v. Cotton*, 26

3. By an agreement under seal, the defendant covenanted to serve the plaintiff as an assistant in the business of a surgeon-dentist, for five years; and the plaintiff, in consideration of such service, covenanted to pay the defendant a salary of 120*l.* for the first year, and to increase it 50*l.* *per annum* for the four succeeding years, and that it should be lawful for the plaintiff, at any time during the said term of five years, to dismiss the defendant from his service, by giving him three months' previous notice in writing: and the defendant further covenanted not to exercise or practise the profession or business of a surgeon-dentist at or within one hundred miles of the city where the plaintiff resided, whilst he continued to practise there, without the previous consent in writing of the plaintiff, under the penalty of 1000*l.*, to be forfeited and paid by the defendant, and to be recoverable in any of his Majesty's Courts of record as and for liquidated damages:—*Held*, that the agreement was void, it being

an unreasonable restraint of trade, and not founded on an adequate consideration. *Quære*, whether the sum of 1000*l.* therein mentioned was a penalty, or liquidated damages? *Horne v. Graves*, 768

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OF PROCESS.

1. On a motion to set aside a writ of attachment of privilege, on the ground that there were not fifteen days between the *teste* and return, the Court permitted the plaintiff to amend without costs. *Popkins v. Amory*, 319

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ASSUMPSIT.

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1. A subscriber and member of a committee of a charitable institution, who attends their meetings for the purpose of managing the affairs of the establishment, is liable to a tradesman for necessities supplied to such charity; and the proper question for the consideration of the jury is, whether the defendant had so acted as to induce the plaintiff to believe that he was to look to the defendant and the other members of the committee for payment. *Burl v. Smith*, 735

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1. In an action on the case, against an attorney, for negligence in suffering judgment to go by default, in an action which the plaintiff had retained him to defend, and for not attending the execution of a writ of inquiry, the Jury found a verdict for the plaintiff:—*Held*, that it was the duty of the defendant to have pleaded the general issue, and not to have suffered judgment to go by default; and it seems that such action is maintainable without proof of special damage:—*Held* also, that the plaintiff having proved negligence in the defendant, it was incumbent on him to shew that the plaintiff had no valid defence to the action which the defendant was instructed to defend, or that the plaintiff had sustained no damage through the judgment by default. *Godefroy v. Jay*, 284

2. If an attorney make a useless or unnecessary investigation the subject of a charge on his client, he cannot recover for such charge in an action for work and labour; and the proper question for the consideration of the Jury in such a case is, whether or not the business done by the attorney was necessary for the purposes of his client. *Hill v. Featherstonehaugh*, 541

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BAIL-BOND.

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1. Where the defendant, a clergyman, was arrested on *Christmas-day*, whilst he was officiating in a chapel, and he afterwards gave a bail-bond, the Court ordered the writ and subsequent proceedings to be set aside. *Goddard v. Harris*, 122

BAIL IN ERROR.

1. A person who is plaintiff both below and above, need not give bail in error. *Duvergier v. Fellowes*, 403

BANKRUPT.

1. A Sheriff's officer seized goods under a writ of *feri facias*, part of which were afterwards packed up in two parcels, the one to satisfy the amount of the levy, the other to be sold to pay the Sheriff's poundage and incidental expenses of the levy. The execution was afterwards abandoned, but the goods which were to be appropriated to the payment of the poundage were sent to the Sheriff's officer, who afterwards received the amount of the poundage, and forwarded the parcel to the execution-creditor. The party against whom the execution was sued out had previously committed an act of bankruptcy:—*Held*, that there was a sufficient conversion by the Sheriff to render him liable in trover to the assignee of the bankrupt. *Carlisle v. Garland*, 102

2. In an action by assignees of a bankrupt, for money had and received, it appeared that the bankrupt was indebted to the defendant on a bill of exchange, drawn by the bankrupt upon and accepted by his father; that, ten days before the bill became due,

the defendant threatened to arrest the bankrupt and his father if it were not paid, when the bankrupt paid the amount to the defendant. On the bankrupt being called as a witness, he stated, that his object in paying the defendant was, to secure his (the bankrupt's) father, and at the same time to benefit the defendant; that he did not recollect that the defendant had used any threat, and that he did not contemplate bankruptcy at the time: but he committed an act of bankruptcy a few hours afterwards. It was left to the Jury to say, whether, under all these circumstances, the payment was made in contemplation of bankruptcy, and voluntarily, or in consequence of a threat from the defendant; and that it was for them to consider what was passing in the bankrupt's mind at the time of the payment, and the probable motives by which he was actuated:—*Held*, that such direction was proper; and the Jury having found that the payment was voluntary, the Court refused to disturb the verdict. *Cook v. Rogers*, 353

3. The 45th section of the statute 6 Geo. 4, c. 16, imposes a penalty on the provisional assignee, if he does not deliver up the bankrupt's estate to the ultimate assignee. The 67th section enacts, that a suit is not to abate by the death of an assignee, but that it may be prosecuted in the name of the new assignee; and by the 100th section, the sum recovered for a penalty under the act is to be divided among the creditors. An assignee having died, and a suggestion of his death entered on the record:—*Held*, that the succeeding assignee was entitled to proceed in a suit which had been commenced by his predecessor against the provisional assignee for a penalty. *Bates v. Sturges*, 568

4. A second commission of bankruptcy having issued against a trader

who had not paid any dividend under the first, or obtained his certificate:—*Held*, that the second commission was null and void. *Nelson v. Cherrill*, 608

5. After a commission of bankruptcy was sued out against the plaintiff, the defendant signed judgment as in case of a nonsuit, taxed the costs, and sued out execution. The first day of the term to which the judgment related, was before the commission was issued:—*Held*, that the costs were not provable under the commission, as they did not constitute a debt till judgment was actually signed; and that, although the plaintiff had obtained his certificate, he was still liable for such costs. *Brough v. Adcock*, 678

6. The defendant having become bankrupt, and obtained his certificate, the Court may stay the proceedings in the action, before judgment, although the 126th section of the statute 6 Geo. 4, c. 16, only authorizes the Court to discharge a bankrupt taken in execution. *Sadler v. Cleaver*, 706

BASTARDY BOND.

1. The putative father of a bastard child voluntarily entered into a bond, conditioned to pay the plaintiffs, parish officers, and their successors, 2s. 6d. per week, for all costs and charges concerning the child, so long as it should live, and be provided for at the expense of the parish:—*Held*, that the bond was a valid security, and an indemnity to the parish, to a certain extent. *Pope v. Sale*, 336

And see PLEADING, 4.

BILLS OF EXCHANGE.

1. The plaintiff accepted a bill of exchange for the accommodation of one H., who deposited it with the de-

fendant as a security for goods bought of him. *H.* afterwards paid for the goods; but, he being further indebted to the defendant, the latter refused to restore the bill, and subsequently indorsed it for value to a third person, who sued the plaintiff thereon, and compelled him to pay the amount, with costs:—*Held*, that the plaintiff might recover from the defendant the amount of the bill, on a count for money paid: and *semble* that he might also have recovered the costs of the action brought against him by the holder, had they been mentioned in the particulars of demand. *Bleaden v. Charles*, 14

2. In an action by the indorsee against the acceptor of a bill of exchange, the declaration alleged that one *J. G.* drew the bill, which the defendant afterwards accepted: it was proved that the defendant accepted the bill in blank, and before the drawer had signed his name to it:—*Held*, to be no variance. *Molloy v. Delves*, 275

3. The notice of dishonour of a bill of exchange should at least inform the party to whom it is addressed, either in express terms, or by necessary implication, that the bill has been dishonoured, and that the holder looks to him for payment of the amount. Where, therefore, the attorney of the holder of a bill, the day after it had been dishonoured by the acceptor, sent a letter to the indorser, stating that a bill for 683*l.*, drawn by *J. K.* upon Messrs. *D., J., & Co.*, bearing the indorsement of the person to whom the letter was addressed, had been put into the hands of the attorney by the holder, with directions to take legal measures for the recovery thereof, unless immediately paid to the attorney:—*Held*, not to be a sufficient notice of the dishonour, to enable the holder to recover against the indorser

in an action upon the bill. *Solarte v. Palmer*, 475

4. A bill of exchange was signed and indorsed by a married woman as drawer, with the assent and in the presence of her husband, who afterwards negotiated it to the plaintiffs, without indorsing it:—*Held*, that they were entitled to recover against the acceptor, as the property in the bill passed to them by the indorsement of the wife, it having been made under the authority of her husband. *Prestwick v. Marshall*, 513

BOND.

1. By the assessed-tax act, 43 *Geo.* 3, c. 99, s. 13, it is enacted, that the collectors shall give security to the commissioners for duly paying such monies as shall come to their hands, and for duly demanding the sums assessed, and for duly enforcing the act against defaulters; and by the land-tax act, 38 *Geo.* 3, c. 5, s. 21, the collectors are required to give security to the commissioners for duly paying to the Receiver-General the sums collected by them. The defendant was sued on a bond containing these conditions, and also a condition to render an account, and pay the sums collected to the commissioners:—*Held*, that the latter condition did not vitiate the bond. *Collins v. Gwynne*, 276

BROKER.

See PRINCIPAL AND AGENT.

CHAMPERTY.

1. By articles of agreement, *T. S.* covenanted to communicate to the defendant all such information as he *T. S.* possessed or could procure, and to use and exert his utmost influence and means for procuring such evi-

dence as should be requisite to substantiate the defendant's claims against *R. M. and W. S. E.*; in consideration of which, the defendant covenanted to pay *T. S.* one eighth part or share of such sum as should at any time be recovered or obtained, either by suit at law or in equity, from *R. M. and W. S. E.*:—*Held*, that the agreement was illegal, as it amounted to champerty. *Stanly v. Jones*, 193

CHARTER-PARTY.

1. The lay days allowed by a charter-party for discharging a cargo, are to be reckoned from the time of the ship's arrival at the usual place of discharge, and not at the entrance of the port to which she is chartered, and this although part of the cargo was taken out, for the purpose of lightening the vessel after she had entered the port, and before her arrival at the quay, which, by the custom of the port, was the usual place of delivery. *Brereton v. Chapman*, 526

CHARITABLE INSTITUTION.

See ASSUMPSIT.

CLERGYMAN.

1. By the statute 9 *Geo. 4.*, c. 31, s. 23, it is enacted, that, if any person shall arrest any clergyman upon any civil process, while he shall be performing divine service, he shall be guilty of a misdemeanor, and being convicted thereof, shall suffer such punishment, by fine and imprisonment, as the Court shall award. Where, therefore, the defendant, a clergyman, was arrested on *Christmas-day*, whilst he was officiating in a chapel, and he afterwards gave a bail-bond, the Court ordered the

COPYHOLD.

writ and subsequent proceedings to be set aside. *Goddard v. Harris*, 122

COMMISSION.

See AGREEMENT, 1.

COMMITTEE-MEN.

See ASSUMPSIT.

COPYHOLD.

1. Since the statute 55 *Geo. 3.*, c. 192, a copyhold estate will pass under a general devise of all the testator's real estate, although there was no previous surrender to the use of his will. *Doe d. Clarke v. Ludlam*, 48

2. The rent reserved in a lease of copyhold premises, is not conclusive as to the amount of a fine payable to the lord; for the tenant may shew that the actual value of the premises demised is less than the rent reserved, and the fine must be estimated according to the improved yearly value. *Earl of Verulam v. Howard*, 148

3. A book was kept by the steward of a manor, in which he entered the assessments of all fines, as well those which were paid, as those which were unpaid, but the steward made out a second book at the end of each year, in which he entered the fines which he had received:—*Held*, that the first book was not admissible in evidence for the lord of the manor, to shew what fines had been paid. *Dean and Chapter of Ely v. Caldecott*, 272

4. If copyhold premises are mortgaged with other property by separate deeds, the *ad valorem* duty must be charged upon the instrument relating to the other property. *Reed v. Wilmott*, 553

COSTS.

See *BILLS OF EXCHANGE*, 1.

1. Time for payment of fee to the Prothonotary on entry of declaration. *Reg. Gen.* 2

2. Charges by an attorney for attending the defendant and advising him, he having been served with a writ after paying the amount of the debt; and attending him, and advising on an action that had been brought against him at the suit of *M.*, are taxable items, and within the statute 2 *Geo. 2*, c. 28, s. 23. So, a sum advanced by the attorney to the defendant, to discharge the debt and costs in *M.*'s action, is a disbursement within that statute; and the attorney cannot recover it in an action for money lent, although it was not included in his bill. *Smith v. Taylor*, 66

3. The costs of a view cannot be allowed to the party obtaining it unless the names of the shewers are inserted in the writ of view. *Taglor v. Thompson*, 255

4. Where a party moves to set aside proceedings for a mere irregularity in process which is amendable as of course, he is not entitled to costs. *Popkins v. Amory*, 319

5. The plaintiff having been nonsuited, and costs taxed for the defendant, the Court refused to allow the plaintiff to set them off against costs to be taxed for him in an action of ejectment in which he had obtained a verdict, but which the defendant had obtained a rule *nisi* to set aside, and enter a nonsuit. *Masterman v. Malin*, 324

6. Where the costs of a nonsuit had been taxed for the defendant and levied, the Court discharged a rule for restraining the execution, with costs, although the plaintiff had obtained a verdict against the defendant in a cross action, which he had obtain-

ed a rule *nisi* to set aside. *Masterman v. Malin*, 325

7. In an action by the plaintiffs to recover an average loss, the question being, whether the ship was seaworthy at the time she sailed from a foreign port, the defendants (underwriters) filed a bill in equity for an injunction, and also for a commission to examine witnesses abroad. After the injunction was sued out, the plaintiffs sent for the captain at the *Havannah*; and, shortly after his arrival, the defendants obtained an order from the Court of *Exchequer*, to examine him on interrogatories, and that the plaintiffs might cross-examine him. The defendants afterwards sued out a commission to examine witnesses at the *Havannah*, which, not being returned within the time prescribed by the Court of *Exchequer*, the defendants paid the loss, without proceeding to trial:—*Held*, that the plaintiffs were entitled to a reasonable allowance for the expenses of bringing over the witness, and also for his detention here and return home: and the Prothonotary having refused to allow such expenses, the Court directed him to review his taxation. *Loneragan v. The Royal Exchange Assurance Company*, 447

8. In trover for goods, the Jury found a verdict for the plaintiff for their full value, but he consented to take them back, upon its being referred to an arbitrator to ascertain to what amount they had been deteriorated in value whilst they remained in the defendant's possession; which amount, together with the costs of the cause, were to be paid to the plaintiff; and an order of reference was drawn up accordingly. The arbitrator ordered the verdict to be reduced, but the award was silent as to the costs of the reference:—*Held*, that, as the reference was for the be-

neft of the defendant, the costs attending it were to be taken as costs in the cause. *Tregoning v. Attenborough*, 463

9 A foreigner and captain of a vessel, on being required to come to this country to give evidence for the plaintiffs in a particular cause, refused to do so unless he were compensated for his loss of time, which the plaintiff's agent abroad promised him should be done:—*Held*, that he was entitled to have a reasonable sum allowed him by way of compensation for such loss. *Lonergan v. The Royal Exchange Assurance Company*, 805

UNDER 43 GEO. 3, c. 46, s. 3.

10. In order to entitle a defendant to costs under the statute 43 Geo. 3, c. 46, s. 3, he must satisfactorily shew the Court that the plaintiff had no reasonable or probable cause for the arrest. Where, therefore, the plaintiff arrested the defendant for 500*l.*, for money lent, and she set up her coverture as a defence, and the plaintiff recovered a verdict for 38*l.* for sums advanced to the defendant after the death of her husband:—*Held*, that she was not entitled to the protection of the statute, as it was incumbent on her to shew that the plaintiff was aware of her coverture at the time of the arrest. *Spooner v. Danks*, 701

COVENANT.

1. *A.*, being seised in fee of certain premises, by indenture of the 5th July, 1814, demised them for twenty-one years to *B.*, who entered, and was possessed accordingly. *B.*, by indenture of the 3rd November, demised the premises to *C.* for the residue of his term therein, excepting the last twenty-one days; and on the 12th February, 1816, *B.*, by deed poll, indorsed on

the counterpart of the lease to *C.*, granted all his (*B.*'s) estate and interest in the premises to *A.*, to hold to him for all such time or term in the counterpart of the lease mentioned, namely, the next immediate reversion, expectant on the determination of *B.*'s lease. *A.*, by deeds of lease and release of the 15th and 16th July, 1822, granted, sold, and assigned all his estate and interest in the premises to the plaintiff, by way of mortgage. On the 19th October, 1816, *C.* assigned all his interest in the premises to the defendants, who never entered, and *C.* remained in possession. In an action brought against the defendants for non-payment of rent:—*Held, first*, that the deed poll did not operate as a surrender of *B.*'s reversion of twenty-one days to *A.*, but only his interest for the term co-extensive with *C.*'s lease; and that the plaintiff might sue the defendants on the covenants contained in such lease. *Secondly*, that the deed poll did not merge the chattel interest in the fee, or suspend the plaintiff's right to sue on the lease to *C.* *Thirdly*, that the reversionary interest expectant on *C.*'s lease, passed to the plaintiff, by the deeds of lease and release, the chattel interest as well as the fee, and that it was properly described in the declaration as an assignment of the chattel interest; and *Lastly*, that the defendants were liable for a breach of the covenants in *C.*'s lease, although they had never entered into possession, they having accepted and retained the deed of assignment. *Burton v. Barclay*, 785

COVERTURE.

See FEME COVERTE.

CUSTOM.

See LANDLORD AND TENANT, 5.

DEED.

1. *A.* (a widow) having a life-interest in money in the funds, and also in a leasehold house, with a contingent reversionary interest to such of her children as should be living at the time of her death; she and all her children joined in an assignment to a trustee of all the money in the funds, and the house, to hold, receive, and take the leasehold, moneys, funds, and other premises, to the trustee, upon trust to receive and convert the same into money; and that, for this purpose, he might, at his own discretion, sell and dispose of the leasehold house, and of any reversionary interest in the funds; and it was further provided, that the trustee should not, during the term of five years, exercise or put in force the trusts declared, so as to deprive *A.* of her life-interest during that period:—*Held*, that, after the expiration of the five years, the trustee had a power to sell *A.*'s property in the funds. *Boyman v. Gutch*, 222

DEED-POLL.

See COVENANT.

DEFEAZANCE.

See WARRANT OF ATTORNEY, 1.

DETINUE.

1. The *Neapolitan* government raised money upon certain *certificats de rente*, or bonds. With each *certificat* or bond was delivered a document called a *bordereau*, annexed to which were a series of *coupons*, or receipts for successive half-yearly payments of the *rentes* or dividends. When the *coupons* attached to the *bordereau* were all made use of, the holder of the *certificat* and remaining *bordereau*

was entitled to receive from the *Neapolitan* government a new *bordereau*, with a new set of *coupons*: both these instruments referred to the *certificat*, and they were never sold in the *London* market without being accompanied by the *certificat*. The plaintiff, being possessed of certain of these *certificats* and *bordereaux*, deposited the latter with his broker, for the purpose of his procuring from the *Neapolitan* government new *bordereaux*, retaining the *certificats* in his own hands. The broker, having procured the new *bordereaux*, with *coupons*, fraudulently pledged them with the defendant. In *detinue* by the original owner, it was left to the Jury to say—*first*, whether the *bordereaux* and *coupons* (unaccompanied by the *certificats*) were negotiable securities, passing by delivery, in the same manner as bank-notes, Exchequer bills, and the like instruments—*secondly*, whether the defendant had exercised due caution in receiving them from the broker, without inquiring for the *certificats* to which they referred:—*Held*, that the direction was right; and the Jury having found a verdict for the plaintiff—The Court refused to disturb it. *Lang v. Smyth*, 78

DEVIATION.

See INSURANCE, 2.

DEVISE.

See WILL.

1. Since the statute 55 Geo. 3, c. 192, a copyhold estate will pass under a general devise of all the testator's real estate, although there was no previous surrender to the use of his will. *Doe d. Clarke v. Ludlam*, 48
2. Devise to trustees in trust, of testator's freehold lands in the parish.

es of *St. J.*, *S.*, and *P.*, for the use of his daughter when she should attain twenty-one, at which time she was to be put into possession, the trustees allowing her, for her maintenance, during her minority, the yearly sum of 25*l.*; but in case she should die during her minority, or without issue, then to the trustees in trust, to the use of *T. E.* for life, remainder to his first and other sons, and their heirs male; but in case the testator's daughter attained the age of twenty-one and married, then to the trustees, for the use of the first male issue of the daughter lawfully begotten, testator's estate *A.* in the parish of *St. J.*; to the second male issue, his estate *B.* in the parish of *S.*; and to the third male issue, his estate *C.* in the parish of *P.*; on their severally attaining the age of twenty-one, and their heirs male. But should testator's daughter die without male issue, and leave female issue, then to the trustees for the use of the said female issues, and their heirs male; but in failure of male issue, to testator's own right heirs for ever. The testator's daughter attained twenty-one, suffered a recovery, and married:—*Held*, that at the time of her marriage she was entitled to an absolute estate of inheritance in fee-simple in the lands in the parish of *S.* *Permewan v. Mitchell*, 257

3. A testatrix devised six messuages to a trustee, his heirs and assigns, in trust, to pay several annuities out of the rents and profits, and after their decease to dispose of the rents and profits equally amongst the testatrix's goddaughter and three other females named in the will, for their sole and separate use; and in case any of them should die, leaving a daughter or daughters, the share or interest of her or them so dying should go to such daughters as they should be in seniority of age and pri-

ority of birth: but, in case any of the first four named females should die without issue in the life-time of the annuitants, then the share or interest of her and them so dying should be paid, applied, and disposed of to the use of several other females named in the will, in succession: all the rest and residue of the testatrix's estate she devised to her goddaughter, one of the first named four devisees:—*Held*, that the four female devisees took estates for life as tenants in common in the premises mentioned in the will; that their daughters also took estates for life in the shares of their respective parents, upon their deaths, and that the goddaughter of the testatrix took the remainder in fee in the whole of the premises devised. *Bennett v. Lowe*, 485

4. A testator commenced his will as follows—"As touching such worldly property wherewith it hath pleased God to bless me in this world, I give, devise, and dispose of the same in the following manner and form;" then, after several dispositions both of land and goods, there was the following residuary clause, "all the rest of my worldly goods, bonds, notes, book-debts, and ready money, and every thing else I die possessed of, I give to my son *George*:"—*Held*, that lands of the testator, not specifically devised by the will, passed to his son *George*, and that he took an estate in fee. *Wilce*, demandant; *Wilce*, tenant, 682

DISTRESS.

See LANDLORD & TENANT, 1, 4.
PLEADING, 1, 7.

EJECTMENT.

1. The attorney of a mortgagee, who was also the attorney of the mortgagor, applied to the tenant in

possession of the mortgaged premises for rent to pay the interest due on the mortgage, and threatened to distrain if the rent were not paid:—*Held*, that the mortgagee thereby recognised the possession of the tenant as legal, and that the mortgagee could not maintain ejectment on a demise laid previously to such application by his attorney. *Doe d. Whitaker v. Hales*, 132

2. In ejectment, the lessor of the plaintiff proved that he and his father were possessed of the premises sought to be recovered for twenty-three years, and received the rent during that period, and that his father died seised. The defendant relied on a possession of ten years succeeding the twenty-three:—*Held*, that the earlier possession by the lessor of the plaintiff must prevail, and that he was entitled to recover, unless the defendant shewed that he had a better title. *Doe d. Harding v. Cooke*, 181

ESTOPPEL.

1. A wharfinger having acknowledged that certain timber on his wharf was the property of the plaintiff:—*Held*, that he was thereby estopped from disputing the plaintiff's title in an action of trover; and it is not necessary that the acknowledgment should be in writing. *Gosling v. Birnie*, 160

EVIDENCE.

1. In ejectment, the question was, whether a slip of land between some ancient inclosures and the highway belonged to the owner of the adjoining freehold, or to the lord of the manor:—*Held*, that acts of ownership by the lord, over slips similarly situated within the manor, were admissible in evidence, although such slips did not adjoin his own freehold;

and such evidence having been rejected, the Court granted a new trial. *Doe d. Barrett v. Kemp*, 173

2. In an action for a libel, the plaintiff alleged in his declaration, that, at the time of the publication, he exercised and carried on, in a lawful manner, the trade and business of a manufacturer of bitters, with which, in the way of his trade, he supplied various licensed publicans, and then proceeded to state that the defendant published the libel of and concerning the plaintiff in the way of his trade:—*Held*, that evidence might be admitted under the general issue, with reference to the allegation of the trade or business of the plaintiff, that what he sold was not bitters, but a composition of a different description. *Manning v. Clement*, 211

3. Where a co-defendant on the record, who had suffered judgment by default, consented to be examined as a witness:—*Held*, that his testimony was admissible, provided he had no interest in the event of the suit. *Worrall v. Jones*, 241

4. A book was kept by the steward of a manor, in which he entered the assessments of all fines, as well those which were paid, as those which were unpaid; but the steward made out a second book at the end of each year, in which he entered the fines which he had received:—*Held*, that the first book was not admissible in evidence for the lord of the manor; to shew what fines had been paid. *Dean and Chapter of Ely v. Caldecott*, 272

5. In trover for wool, which the plaintiffs alleged the defendants had obtained by fraud, it appeared that it had been purchased of the plaintiffs by one D., as agent for Messrs. W. & Co., and that they pledged it two days afterwards to the defendants, for an advance made by them to W. & Co., through the intervention of

D., who acted as the agent of the defendants as well as of *W. & Co.* The plaintiffs, in order to shew that *W. & Co.* had obtained the wool without intending to pay for it, they being insolvent at the time of the purchase, and which *D.* was aware of, offered certain contracts in evidence, signed by *D.*; and his handwriting to them having been proved:—*Held*, that such contracts were admissible, without calling *D.* as a witness. *Irving v. Motley*, 380

6. In an action by an after-appointed, against a provisional, assignee, for a penalty under the 45th section of the 6 *Geo.* 4, c. 16, for not delivering up the bankrupt's estate:—*Held*, that, as the assignment to the provisional assignee was recited in the assignment to the second assignee, it was not incumbent on the plaintiff to produce it in evidence. *Bates v. Sturges*, 568

7. The defendant, the master of a vessel, agreed in writing to take out to the *Cape of Good Hope* a boat belonging to the plaintiff, not exceeding thirty feet in length and ten in width. The plaintiff tendered a boat within these dimensions, but it was a decked boat. The defendant refused to take it on board unless the deck were removed; and he offered to take it off and replace it on the arrival of the vessel at the *Cape*. This the plaintiff declined. The defendant proved that it was the custom to remove the decks of such boats, as they tended to impede the navigation of the vessel:—*Held*, that such evidence was properly received, and that the plaintiff could not recover against the defendant in an action for a breach of the agreement, in not taking out the boat. *Haynes v. Halliday*, 572

8. Parol evidence to explain the intention of a testator as to the disposition of part of his property, must be confined to declarations made by

him at or about the time of making his will: at all events, such evidence is not admissible to shew that the testator meant that his executor should have the residue, when a specific legacy was bequeathed to him for his care and trouble. *Whitaker v. Tatham*, 628

9. Ploughing up an old meadow and converting it to arable, is waste, and the tenant cannot give evidence under the general issue of *no waste done*, that the meadow was ploughed according to the custom of the country, and to ameliorate the land; as the reason for altering the character of the land must be pleaded by way of justification. So, if a tenant for life cut down timber trees, he cannot give in evidence, under the general issue, that they were cut for repairing the premises, or that the lessor consented to exchange one of the trees so cut, it being found to be unfit for the purpose for which it was intended. *Simmons v. Norton*, 645

EXCESSIVE DAMAGES.

See PRACTICE, 4.

EXECUTOR.

1. An executor is not entitled to the undisposed of residue of the testator's personal estate, when a specific sum is bequeathed to the executor for his trouble in the execution of the will. *Whitaker v. Tatham*, 628

FALSE IMPRISONMENT.

See PRACTICE, 4.

FEME COVERTE.

See BILLS OF EXCHANGE, 4.

COSTS, 10.

INSOLVENT DEBTOR, 2.

1. A married woman having been

arrested by the indorsee upon her acceptance of a bill of exchange, and the drawer knew that she was married at the time of the acceptance, but she then said that she had property of her own, and would pay the bill when due:—The Court ordered the bail bond to be delivered up to be cancelled, on payment of the costs of the application by the defendant. *Slater v. Mills*, 603

FINE.

See COPYHOLD, 2, 3.

FINES AND RECOVERIES.

1. The Court ordered the indentures of a fine to be made to agree with the concord, by the insertion of all the limitations specified in the concord. *Butt*, plaintiff; *Noel and Wife*, deforciant, 159

2. In a recovery, the word "received" having been substituted for "acknowledged," at the foot of the *præcipe* and warrant of attorney, the Court would not allow the recovery to pass. *Ockley, d., Furber, t., Ward*, v. 249

3. In the deed to lead the uses of a recovery, the premises were described as a moiety or half enddeal of a messuage and three hundred acres of meadow; in the recovery, the words "or half enddeal", were omitted: the Court allowed the recovery to be amended, by the insertion of those words after the word "moiety." *Manners*, vouchee, 378

FOREIGN COURT.

1. The sentence of a foreign Court of Admiralty, condemning a vessel for attempting to violate a blockade, is not conclusive, unless the fact upon which the condemnation proceeded appears upon the face of the sentence,

free from doubt and ambiguity; it cannot be collected by mere inference, nor can it be left in uncertainty whether the vessel was condemned upon one ground, which would be a just ground of condemnation by the law of nations, or on another ground, which would only amount to a breach of the municipal regulations of the condemning country. *Dalglish v. Hodgson*, 407

FOREIGN LOAN.

See DETINUE.

GAMING.

1. Although a wager on a horse-race, for a less sum than 10*l.* may be legal where the stakes exceed 50*l.*, yet a wager exceeding 10*l.* on such race, whether legal or not, is void by the statute 16 *Car. 2*, c. 7, s. 3, as the statutes 13 *Geo. 2*, c. 19, and 18 *Geo. 2*, c. 34, legalize horse-racing only, and not bets made at such races. Where, therefore, the plaintiff, as indorsee of a bill of exchange for 185*l.*, sued the defendant as the acceptor, who accepted it in payment of a bet to that amount, which he lost on the *St. Leger* stakes, at *Doncaster* races:—*Held*, that the plaintiff could not recover, although he had given a valuable consideration for the bill, and had no notice of the circumstances under which it was accepted. *Shillito v. Theed*, 303

GUARANTIE.

1. The defendants gave the plaintiff the following undertaking in writing:—"We hereby undertake to pay you, agreeably to instructions from *J. W.*, 1,262*l.* on his account, as soon as we shall have received from Messrs. *R. & R.*, of *New South Wales*, the amount of moneys in their hands belonging to *J. W.*, and now

under attachment by you." By the letter of instructions from *J. W.* to the defendants, he authorised them to pay the plaintiff, in consideration of his having agreed to release an attachment of certain moneys which were to come into the defendants' hands from Messrs. *R. & R.*, 1,262*l.* out of the said moneys, when the defendants should receive them on *J. W.*'s account: the payment to be taken by the plaintiff in discharge of a bill for 1,262*l.*, which bill *J. W.* requested the defendants to receive from the plaintiff at the time of payment as a sufficient discharge:—*Held*, that the defendants were bound to pay the plaintiff the above sum of 1,262*l.* on the receipt of the first proceeds remitted by Messrs. *R. & R.* on account of *J. W.*, and that they could not postpone the payment until they had received the whole amount of the moneys in the hands of Messrs. *R. & R.*, belonging to *J. W.* *Hare v. Richards*, 35

2. The defendant gave the plaintiffs the following guarantie, contained in a letter—"In consideration of your giving credit in the way of your trade to *L. M.*, I guarantee to you the payment of any debt which he may contract with you from time to time, as a running balance of account, to any amount not exceeding 400*l.*" The plaintiffs, on the faith of this guarantie, supplied *L. M.* with goods to the amount of 800*l.*; and he afterwards, being in insolvent circumstances, assigned all his effects to trustees for the benefit of his creditors. The plaintiffs claimed a debt of 625*l.*, as the balance due to them against *L. M.*'s estate, and received a dividend of 8*s.* 9*d.* in the pound on the whole debt. In an action by the plaintiffs against the defendant on his guarantie:—*Held*, that they were not entitled to deduct the whole sum received as a dividend from the gross

amount of the debt, and to hold the defendant liable on his guarantie for the residue of the demand up to the extent of the guarantie; but that the dividend received was to be applied rateably to the whole debt, as well the part covered by the guarantie as that which was not; and therefore, that a rateable deduction was to be made for the sum covered by the guarantie. *Bardwell v. Lydall*, 327

3. *A.* guaranteed the payment of goods to be supplied by *B.* to *C.*—*C.* became bankrupt, and *B.* proved under his commission, and afterwards signed his certificate, although *A.* gave him notice not to do so:—*Held*, that nevertheless, *A.* was not discharged from his liability as surety, as it was his duty to have paid the debt due from *C.* to *B.*; but, as he neglected to do so, and permitted *B.* to prove under *C.*'s commission, *B.*'s signing the certificate was not such an act as to alter *A.*'s right without his control or consent, as he might have paid the debt in due time, and thereby prevented *B.* from proving under the commission. *Browne, v. Carr*, 497

HORSE RACES.

See GAMING.

INSOLVENT DEBTOR.

1. *Quære*, whether an insolvent debtor, who suffers judgment by default in an action brought against him, after he has duly obtained his discharge under the 7 *Geo.* 4, c. 57 (the debt having been inserted in his schedule), is entitled to be relieved from an execution upon a summary application. *Cook v. Townsend*, 12

2. A testator left an annuity of 20*l.* a-year each to two female servants. One of the annuitants married in the life-time of the testator, upon which

he, by a codicil, directed her annuity to be paid to her sole and separate use, independently of her husband. The other annuitant, who did not marry till after the testator's death, took under his will, by which the annuity was payable to her without any restriction. Her husband having become insolvent:—*Held*, that the annuity passed to his assignees. *Count v. Ward*, 618

INSPECTION OF PAPERS.

1. In an action against the Sheriff for a false return, he produced two deeds at the trial, one of which was read, and the plaintiff admitted the execution of the other, which was not given in evidence. The Jury found a verdict for the plaintiff, and the Court having directed a new trial, the plaintiff was allowed to inspect and take a copy of the deed which was read, but not of that which was not given in evidence.—*Hewitt v. Pigott*, 252

INSURANCE.

See Costs, 7.

1. The plaintiff effected a policy of insurance against fire, which contained a condition, that, if fraud should appear in the claim made, or false swearing in support thereof, the claimant should forfeit all benefit under such policy. The plaintiff's property was insured in 1000*l*., and he made an affidavit, that, in consequence of the fire, he had sustained damage to the extent of 1085*l*.. Having sued the directors for the amount, the Jury, after conflicting evidence on both sides, found a verdict for the plaintiff for 500*l*.. The Court directed a new trial. *Levy v. Baillie*, 208

2. A policy of assurance was effected on goods by four ships named,

all or any, at and from *Singapore*, *Penang*, *Malacca*, and *Batavia*, all or any, to the ship's port or ports of discharge in *Great Britain*, or to any port or ports in the United *Netherlands*, or to *Altona* or *Hamburg*, all or any, with leave to touch, stay, and trade at all or any ports or places whatsoever and wheresoever, in the *East Indies*, *Persia*, or elsewhere, as well beyond as at and on this side of the *Cape of Good Hope*, in port or at sea, at all times and in all places, until safely arrived at her final port of discharge, beginning the adventure upon the goods from the loading thereof on board the said ships as above, with leave for the ship in that voyage to proceed and sail to, and touch and stay at, any ports or places whatsoever and wheresoever, in any direction, and for any purpose, necessary or otherwise, particularly *Singapore*, *Penang*, *Malacca*, *Batavia*, the *Cape of Good Hope*, and *St. Helena*, with leave to take on board, discharge, reload, or exchange goods or passengers, without being deemed a deviation. The ship took part of her cargo on board at *Batavia*, and sailed from thence in the prosecution of the adventure to *Sourabaya*, which is four hundred miles to the eastward of *Batavia*, and directly out of the course from *Batavia*, *Singapore*, *Penang*, or *Malacca*, to *Europe*. She took other goods on board at *Sourabaya*, then returned to *Batavia*, and sailed from thence with all the goods on board for *Europe*, but was lost by perils of the seas:—*Held*, that the sailing to *Sourabaya*, was a sailing on the voyage insured; that it was no deviation; and that the goods put on board there were covered by the policy. *Leathley v. Hunter*, 457

INTEREST.

1. The defendants gave the plaintiff

the following undertaking in writing:—"We hereby undertake to pay you, agreeably to instructions from *J. W.*, 1,262*l.* on his account, as soon as we shall have received from Messrs. *R. & R.* of *New South Wales*, the amount of moneys in their hands belonging to *J. W.*, and now under attachment by you." By the letter of instructions, the payment was to be taken by the plaintiff in discharge of a bill for 1,262*l.*, and which bill *J. W.* requested the defendants to receive from the plaintiff at the time of payment as a sufficient discharge:—*Held*, that the plaintiff was not entitled to recover interest from the time the defendants received a sufficient sum belonging to *J. W.* from Messrs. *R. & R.* to satisfy their undertaking, as they did not guarantee the payment of the bill of exchange, it being merely referred to in the instructions as an outstanding security which the defendants were to receive from the plaintiff at the time of payment. *Hare v. Rickards*, 35

LANDLORD AND TENANT.

See EJECTMENT.

LEASE.

1. To entitle a landlord to follow and distrain goods, under the statute 11 *Geo. 2*, c. 19, there must be some evidence to shew that the removal was fraudulent, with intent to elude a distress, and also that sufficient was not left upon the demised premises to satisfy the landlord's claim. *Parry v. Duncan*, 19

2. In an action by a landlord against a Sheriff, for removing, under an execution, the goods of his tenant, without reserving him a year's rent, as required by the statute 8 *Anne*, c. 14, the tenant was called as a witness, to prove the rent due; and, on his being objected to on the ground of interest, the landlord gave him a ge-

neral release:—*Held*, that the landlord was not thereby precluded from recovering against the Sheriff the amount of the rent, as it was the misconduct of the Sheriff in not reserving the rent, which made the release necessary. *Thurgood v. Richardson*, 266

3. The first section of the statute 8 *Anne*, c. 14, is not to be limited to the case of an original demise of entire premises, but applies to a sub-lessee, and to goods taken in execution in apartments being parcel of a messuage. *Ibid.* 270

4. A landlord cannot distrain unless the tenant actually hold under him, and at a rent certain. Where, therefore, the plaintiff and defendant entered into an agreement in writing, by which the latter agreed to let, and the former to take a lease of a house for a term of sixty years, at the yearly rent of 25*l.*, the defendant agreed to complete the house, and make it fit for habitation, and to allow the plaintiff a certain sum towards erecting an oven, and the plaintiff entered and built an oven, but the defendant never completed the premises, nor did he call on the plaintiff for any rent for nearly four years from the time he took possession, and the plaintiff said he had the money ready, and that he was willing to pay what was due, but that he was entitled to deduct a certain sum for repairs, and that he wanted to have the house completed according to the covenant:—*Held*, that this was a mere conditional promise to pay the rent; and, no specific sum having been agreed to be paid to the plaintiff, that the defendant could not distrain. *Regnart v. Porter*, 370

5. A tenant held a farm under a lease, containing (among others) a condition that the wheat land should be summer fallowed and well manured for the crop. By the custom of the

country, a tenant who had sown his land with wheat after a crop of turnips at the wheat seedness next before the expiration of his tenancy, was entitled to cut and carry away one half of the wheat so sown:—*Held*, that, as the condition in the lease was confined to the period of *holding* the farm, and not to the time of quitting, the tenant was entitled to the benefit of the custom, giving him a right to a proportion of the wheat sown by him after turnips, leaving the landlord to his remedy for breach of covenant; and therefore, that the incoming tenant had no right to seize a waggon of the off-going tenant, who entered on the land so sown after turnips, after the expiration of his tenancy, for the purpose of taking away a moiety of a crop of wheat. *Holding v. Pigott*, 427

LAND TAX.

See BOND.

LAY DAYS.

See CHARTER-PARTY.

LEASE.

See LANDLORD AND TENANT, 5.

1. By an instrument in writing, dated the 11th of *September*, 1830, the defendant agreed that day to let to the plaintiff the whole of his premises, situate, &c., for ten years, he further agreed to build a brew-house and make a cellar at his own expense, at the yearly rent of *55l.*, to be paid half yearly. He further agreed to pay the ground rent, which was *4l.* yearly; and acknowledged that he had that day received from the plaintiff *4l.* in earnest:—*Held*, to be an actual and present demise, and

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not any agreement for a lease; and, therefore, that it required a lease stamp. *Staniforth v. Fox*, 589

LIBEL.

1. In an action for a libel, the plaintiff alleged in his declaration, that, at the time of the publication, he exercised and carried on, in a lawful manner, the trade and business of a manufacturer of bitters, with which, in the way of his trade, he supplied various licensed publicans; and then proceeded to state, that the defendant published the libel of and concerning the plaintiff in the way of his trade:—*Held*, that evidence might be admitted under the general issue, with reference to the allegation of the trade or business of the plaintiff, that what he sold was not bitters, but a composition of a different description. *Manning v. Clement*, 211

LICENSE.

1. A parol license, after it is executed at the expense of the grantee, is not countermandable by the grantor. Where, therefore, the plaintiff's father gave the defendants leave, by parol, to lower the bank of a river and erect a weir, whereby a part of the water which before flowed to the plaintiff's mill was diverted:—*Held*, that his son could not maintain an action against the defendants for continuing the weir, although his father, a few years after the license was given, had required them to raise up the bank and pull down the weir. *Liggins v. Inge*, 712

LIQUIDATED DAMAGES.

See AGREEMENT, 3.

MANDAMUS.

See PRACTICE, 7.

844 NOTICE OF DISHONOUR.

MANORIAL RIGHTS.

See EVIDENCE, 1.

MEMORANDA, 1, 484.

MERGER.

See COVENANT.

MISDIRECTION.

See WARRANTY, 2.

MONEY HAD RECEIVED.

1. The plaintiff, as managing owner and ship's husband, expended a certain sum for the outfit of the vessel:—*Held*, that he might sue each of the part-owners separately for his share of the expense. *Helme v. Smith*, 744

MONEY PAID.

See BILLS OF EXCHANGE, 1.

MORTGAGE.

1. A mortgage of chattels without delivery of possession to the mortgagee is valid, if the mortgagor's continuing in possession is consistent with the terms of the deed. *Reed v. Wilmott*, 553

NEAPOLITAN STOCK.

See DETINUE.

NEGOTIABLE SECURITIES.

See DETINUE.

NOLLE PROSEQUI.

See PRACTICE, 24.

NOTICE OF DISHONOUR.

See BILLS OF EXCHANGE, 3.

PENALTY.

OVERSEERS.

See TRESPASS, 1.

PARTNERS.

1. The plaintiff and defendant were partners as attorneys; independently of the partnership account, there was a private separate account of moneys due from the defendant to the plaintiff, to recover the balance of which the plaintiff sued the defendant in *assumpsit*, and declared on the common money counts. It had been previously agreed between them that the plaintiff should accept a gross sum for interest on the private account, to be made up to a certain day, that the plaintiff would accept 24 per cent. for interest on the private account from that date for six months, and that, after that period, the interest was to be 5l. per cent.; that the defendant's share of the partnership money then in the plaintiff's hands should be applied in liquidation of the balance of the private account; but that the amount of all the bills due to the firm should be received by the plaintiff, and applied in the first instance to discharge certain partnership liabilities, and then in discharge of the balance due from the defendant to the plaintiff on the private account:—*Held*, that the effect of the agreement, as far as it regarded the private account, was to insure to the plaintiff the right to have the defendant's share of the partnership moneys, whenever ascertained, applied in discharge of his separate claim upon the defendant; and that there was nothing to suspend the plaintiff's right of action against the defendant for the recovery of the balance of the private account. *Simpson v. Rackham*,

612

PENALTY.

See AGREEMENT, 3.

PLEADING.

See EVIDENCE, 2.
LIBEL.

1. It is not necessary that an avowry for rent in arrear should allege in precise terms that the plaintiff was tenant to the avowant; if the fact of the tenancy can be collected from the whole of the avowry, it is sufficient.

Innes v. Colquhoun, 63

2. To an action of trespass for an assault, the defendants pleaded that they were overseers of the poor, and that a select vestry of the parish was duly assembled and holden in a certain school-room within the parish, and that the defendants, as overseers, were present; that the plaintiff unlawfully entered the room, and the defendants expelled him: it was proved that one of the five members who constituted the select vestry, had not been summoned, or received any previous notice of the meeting:—*Held*, that the plea was not proved, as the meeting was not a legally constituted vestry, so as to support the allegation that the select vestry was duly assembled. *Dobson v. Fussey*,

112

3. In an action by the indorsee against the acceptor of a bill of exchange, the declaration alleged that one J. G. drew the bill, which the defendant afterwards accepted: it was proved that the defendant accepted the bill in blank, and before the drawer had signed his name to it:—*Held*, to be no variance. *Molloy v. Delves*,

278

4. To an action on a bastardy bond, to recover divers weekly payments, the defendant pleaded that he was able and willing to provide for the child without the assistance of the parish, and that he had requested the plaintiffs to deliver it over to his care; but that the child had been provided

for at the expense of the parish, by the plaintiffs, of their own wrong, and that, if they were damnified, they were damnified of their own wrong:—*Held*, that the plea disclosed no matter of legal defence to the action, as the only plea in discharge of the bond would be performance, as the child had been provided for at the expense of the parish. *Pope v. Sale*,

336

5. The plaintiff, in his declaration, alleged that there was a public way to pass and repass on foot and with carts. The Jury negatived the footway. *Quære*, whether the allegation is divisible? *Vallance v. Savage*,

576

6. To an action of trespass for breaking and entering the plaintiff's close, breaking open the gate and lock, and driving away his cattle, the defendants pleaded, by way of justification, that, rent being due from A. to B., the plaintiff and A. fraudulently carried off the cattle to prevent a distress, and conveyed them to the close in which &c.; and that the defendants, as bailiffs of B., and by her command, entered the close, and broke the lock and seized the cattle as a distress for rent so due from A. to B.:—*Held* insufficient, as by the statute 11 Geo. 2, c. 19, s. 7, the presence of a constable is required; and as that fact was not alleged, the plea was bad, even after verdict. *Rich v. Woolley*, 663

7. The defendants also pleaded, that they had distrained A.'s cattle for rent due from him to B.; that the plaintiff wrongfully took away the cattle so distrained and then in the custody of the defendants; and because they were wrongfully detained by the plaintiff in the close in which &c., the defendants, as bailiffs of B., broke open the close to retake the cattle and impound them as a distress for the rent due:—*Held*, that such plea was bad, as it did not allege that the

cattle were retaken upon a fresh pursuit. *Ibid.* 663

PRACTICE.

1. The plaintiff, being nonsuited, obtained a rule *nisi* for a new trial. Afterwards, and before the rule came on for argument, the defendant died:—*Held*, that the suit did not thereby abate. *Bull v. Price*, 10

2. *Quære*, whether an insolvent debtor, who suffers judgment by default in an action brought against him, after he has duly obtained his discharge under the 7 *Geo. 4*, c. 57, (the debt having been inserted in his schedule), is entitled to be relieved from an execution upon a summary application. *Cook v. Townsend*, 12

3. By the statute 9 *Geo. 4*, c. 31, s. 23, it is enacted, that, if any person shall arrest any clergyman upon any civil process, while he shall be performing divine service, he shall be guilty of a misdemeanor, and, being convicted thereof, shall suffer such punishment, by fine and imprisonment, as the Court shall award. Where, therefore, the defendant, a clergyman, was arrested on *Christmas-day*, whilst he was officiating in a chapel, and he afterwards gave a bail-bond, the Court ordered the writ and subsequent proceedings to be set aside; but, as neither the plaintiff nor his attorney ordered the arrest to be made on *Christmas-day*, the rule for setting aside the proceedings was made absolute without costs. *Goddard v. Harris*, 122

4. The plaintiff, a person in a humble station of life, had a relation, a lady of fortune, residing at the defendant's house. The plaintiff, being importunate in his demands for relief, and refusing to leave the premises, the defendant ordered a constable to take him into custody, which he did, and the plaintiff remained in custody one night at an inn. On the following morning he was brought be-

fore the defendant, who offered him two sovereigns, which the plaintiff accepted. The defendant also gave him money to pay the hire of a horse, and refreshment. In an action of trespass for false imprisonment, the Jury having found a verdict for the plaintiff, with 100*l.* damages, the Court considered them to be excessive, and directed a new trial. *Price v. Severne*, 125

5. The plaintiff's attorney delivered a letter, containing the copy of a writ, to the defendant's son, at the defendant's house, and he promised to give it to his father. The defendant moved to set aside the proceedings, on an affidavit that he had never received the process; but the son made no affidavit:—*Held*, that the service on the son was equivalent to a service on the father, and that the latter should have sworn that he had never seen the writ. *Rhodes v. Innes*, 153

6. A warrant of attorney authorized *M. H.* to enter up judgment against the defendant; and by the defeazance it was stated that the warrant of attorney was given to secure payment to *M. H.*, his heirs, executors, administrators, and assigns:—*Held*, that judgment could not be entered up by the executrix of *M. H.* after his death, as the warrant of attorney only authorized *M. H.* himself to enter up judgment. *Henshall v. Matthew*, 157

7. The defendant, at his own expense, obtained a writ of *mandamus* under the statute 13 *Geo. 3*, c. 63, s. 44, for examining witnesses in *India*. The depositions were returned, and filed at the Secondaries' office of this Court:—*Held*, that the plaintiff was entitled to copies of them, on payment of the charges for making such copies, although he had not attended in Court in *India*, either by his agent or counsel. *Davidson v. Nicol*, 185

8. In trespass for an assault, the defendant pleaded the general issue. The Jury found a verdict for the plaintiff, and a new trial was directed, on the ground that the damages were excessive. The Court refused to allow the defendant to withdraw the general issue, and plead accord and satisfaction. *Price v. Severne*, 250

9. In an action against the Sheriff for a false return, he produced two deeds at the trial, one of which was read, and the plaintiff admitted the execution of the other, which was not given in evidence. The Jury found a verdict for the plaintiff, and the Court having directed a new trial, the plaintiff was allowed to inspect and take a copy of the deed which was read, but not of that which was not given in evidence. *Hewitt v. Pigott*, 252

10. The costs of a view cannot be allowed to the party obtaining it, unless the names of the shewers are inserted in the writ of view. *Taylor v. Thompson*, 255

11. On a motion to set aside a writ of attachment of privilege, on the ground that there were not fifteen days between the *teste* and return, the Court permitted the plaintiff to amend without costs; and where a party moves to set aside proceedings for a mere irregularity in process which is amendable as of course, he is not entitled to costs. *Popkins v. Amory*, 319

12. The Court allowed judgment to be entered up on an old warrant of attorney, upon an affidavit by the plaintiff's agent, that he saw the defendant execute the warrant of attorney, which was given to secure a sum of money due to the plaintiff, which remained due and unpaid. *Huthwaite v. Hood*, 321

13. In *assumpsit*, for goods sold, and a plea of the general issue, the only question was, whether the plaintiff

had agreed to take certain bills of exchange in payment of his demand, and to exonerate the defendant from all responsibility on account of such bills; and the Jury found a verdict for the plaintiff. On a motion for a new trial, on the ground that the verdict was against evidence, the Court imposed on the defendant the terms of confining the inquiry on the second trial to that single point, and to pay the amount of the verdict into Court, together with the costs of the first trial. *Thwaites v. Sainsbury*, 321

14. The plaintiff having been nonsuited, and costs taxed for the defendant, the Court refused to allow the plaintiff to set off against them costs to be taxed for him in an action of ejectment in which he had obtained a verdict, but which the defendant had obtained a rule *nisi* to set aside, and enter a nonsuit. *Masterman v. Malin*, 324

15. Where the costs of a nonsuit had been taxed for the defendant, and levied, the Court discharged a rule for restraining the execution, with costs, although the plaintiff had obtained a verdict against the defendant in a cross action, which he had obtained a rule *nisi* to set aside. *Ibid.* 325

16. A person who is plaintiff both below and above, need not give bail in error. Where, therefore, upon demurrer to a plea, judgment was given in this Court for the defendant below, and the plaintiff brought a writ of error in the Court of *King's Bench*, and the judgment of this Court was affirmed; after which he brought a writ of error to the House of Lords, upon which a recognizance of bail in error was entered into—The Court ordered it to be cancelled, on an application by the bail, although it was sworn that the plaintiff was a foreigner and insolvent. *Duvergier v. Fel-lows*, 403

17. In trover, for *billetes* paid to the plaintiffs by the *Peruvian* government, and purporting to be of the value of 16,000 dollars; the cause was referred to arbitration; and an award having been made in favour of the plaintiffs, the Court ordered the value of the *billetes* to be estimated by the Prothonotary, at the rate at which they were current at the time of the award:—*Held*, that such value was to be estimated as the value of a bill of exchange for the amount of the dollars specified in the *billetes*, upon a solvent house in the country where they were issued, although they were at a considerable discount at the time of making the award. *Delegal v. Naylor*, 443

18. The defendant obtained a new trial, on the ground of the absence of a material witness, upon the terms of the defendant's paying into Court the amount of the verdict for the plaintiff. The Court would not afterwards allow the defendant to take the money out upon an affidavit which stated that the plaintiff was in contempt in the Court of *Chancery*, for not putting in an answer to a bill for a discovery which the defendant had filed against him, and which answer, if true, would constitute a good defence to the action. *Jackson v. Hopkinson*, 511

19. The defendant having closed his evidence in support of certain items in a particular of set-off, and the Judge having begun to sum up to the Jury:—*Held*, that it was too late for the plaintiff's counsel to object to the sufficiency of proof of one of such items. *Abbott v. Parsons*, 521

20. The Court will not stay an execution sued out at the instance of the defendant, after the allowance of a writ of error on a judgment of nonsuit, unless the plaintiff or his attorney point out some real error; and the statute 1 *Will.* 4, c. 70, s. 8, does

not alter the practice in this respect. *Keeling v. Austin*, 599

21. A married woman, having been arrested by the indorsee upon her acceptance of a bill of exchange, and the drawer knew that she was married at the time of the acceptance, but she then said that she had property of her own, and would pay the bill when due:—The Court ordered the bail-bond to be delivered up to be cancelled, on payment of the costs of the application by the defendant. *Slater v. Mills*, 603

22. The plaintiff, having sued out a writ of *capias ad satisfaciendum* against the defendant, sent it to the Sheriff to be executed. The under-sheriff sent the writ to the defendant's attorney, who neglected to levy or act upon it:—*Held*, that the attorney could not be called on by a summary application to pay the plaintiff the amount of the debt, as his remedy in the first instance was against the under-sheriff, for having delivered the writ to the defendant's attorney, instead of his own officer. *Harding v. Francis*, 627

23. The defendant having become bankrupt, and obtained his certificate, the Court may stay the proceedings in the action, before judgment, although the 126th section of the statute 6 *Geo.* 4, c. 16, only authorizes the Court to discharge a bankrupt taken in execution; but the defendant having created unnecessary expense and delay to the plaintiff, he was required to pay all the costs incurred from the day the cause might have been tried, to the time of the application to stay the proceedings. *Sauller v. Cleaver*, 706

24. The plaintiff declared against the defendant in *assumpsit* as the acceptor of a bill of exchange. The declaration also contained counts for goods sold, work and labour, and the common money counts. The defen-

dant suffered judgment by default, upon which the plaintiff signed interlocutory judgment as for want of a plea, and the judgment was entered generally to the whole declaration. The plaintiff afterwards obtained a rule to compute principal and interest on the bill, and taxed his costs, and signed final judgment accordingly. After taxation, the plaintiff entered a *nolle prosequi*, as follows, namely, that he would not further prosecute his suit as to the promises and undertakings in the second and subsequent counts of the declaration; therefore, as to such promises, let the defendant be acquitted, &c.: *Held*, that such entry was in effect a *remittitur*, and that, as the plaintiff had given up the damages after judgment, he was precluded from suing again for the original cause of action on the common counts. *Bowden v. Horne*, 756

PRINCIPAL AND AGENT.

1. In trover for wool, which the plaintiffs alleged the defendants had obtained by fraud, it appeared, that it had been purchased of the plaintiffs by one D., as agent for Messrs. W. & Co., and that they pledged it two days afterwards to the defendants, for an advance made by them to W. & Co., through the intervention of D., who acted as the agent of the defendants as well as of W. & Co. The Jury having found that the transaction between D. and W. & Co. was fraudulent, but that the defendants were not cognizant of the fraud, and that D. was their agent, as well as the agent of W. & Co., and the plaintiffs obtained a verdict, the Court refused to grant a new trial, as the defendants were liable for the fraudulent acts and misconduct of their own agent. *Irving v. Motley*, 380

2. In an action for goods sold and

delivered, the question was, whether the contract was made by the defendant as principal or as agent for third persons who employed him to make purchases on their account; and it was left to the Jury to say, whether the defendant told the plaintiff that he was acting as an agent at the time of the purchase:—*Held*, that it was not a misdirection, as it was incumbent on the defendant to shew, either that he told the plaintiff that he made the purchase on account of his principals, or that the plaintiff knew that he was merely acting as their agent. *Seaber v. Hawkes*, 649

PROMOTIONS, 1, 484.

RECOVERIES.

See FINES AND RECOVERIES.

REFERENCE.

See Costs, 8.

REGULÆ GENERALES.

1. It is ordered, that, in future, where any amendment in the declaration shall be made after a rule to plead shall have been entered, no new rule to plead shall be necessary, provided such amendment be made in the term, or the vacation succeeding the term, in or of which the rule to plead shall have been entered; and the defendant shall have two days, exclusive of the day on which the amendment shall be actually made, to alter his plea, or plead *de novo*, unless otherwise ordered by the Court, or the Judge granting leave for the amendment.—E. T. 1 Will. 4, 482

2. Whereas, by the antient course of this Court, the fee paid to the Prothonotaries for the entry of every declaration in a cause has hitherto been of right payable at the time of filing thereof: And whereas it is

expedient, that, for the future, the practice of this Court should be made conformable to that of the respective Courts of *King's Bench* and *Exchequer*, so far as regards the time of such payment: It is therefore ordered, that, from and after the es-soign day of next *Trinity* term, the fee due to the said Prothonotaries for such entry as aforesaid, may be paid at any time previously to entering the issue or passing the record in such cause; or, in case there shall be no record, at any time previously to signing interlocutory or final judgment: And further, that, in all cases where there shall be no judgment, the said fee shall be payable at the time of taxing costs, where the proceedings in any cause are stayed, or such cause is terminated by any rule of this Court, or order of a Judge. *E. T. 1 Will. 4.* 483

And see pp. 813, et seq.

RELEASE.

1. In an action by a landlord against a Sheriff for removing, under an execution, the goods of his tenant, without reserving a year's rent, as required by the statute 8 *Anne*, c. 14, the tenant was called as a witness, to prove the rent due; and, on his being objected to on the ground of interest, the landlord gave him a general release:—*Held*, that the landlord was not thereby precluded from recovering against the Sheriff the amount of the rent, as it was the misconduct of the Sheriff in not reserving the rent, which made the release necessary. *Thurgood v. Richardson.* 266

REMITTITUR.

See PRACTICE, 24.

REPLEVIN.

1. It is not necessary that an avow-

STAYING PROCEEDINGS.

ry for rent in arrear should allege in precise terms that the plaintiff was tenant to the avowant; if the fact of the tenancy can be collected from the whole of the avowry, it is sufficient. *Innes v. Colquhoun.* 63

RESTRAINT OF TRADE.

See AGREEMENT, 3.

RIGHT OF WAY.

1. The plaintiff having proved a right of way over a piece of ground from 1776 to 1830, and it appearing that the soil had, in 1828, been conveyed to commissioners appointed under a local act of Parliament:—*Held*, that the plaintiff was entitled to a compensation for the obstruction of the way by one of the commissioners, although such commissioners were empowered to erect a market upon the *locus in quo* more than fifty years before the obstruction took place. *Vallance v. Savage.* 576

2. The plaintiff, in his declaration, alleged that there was a public way to pass and repass on foot and with carts. The Jury negatived a foot-way. *Quære*, whether the allegation is divisible? *Ibid.*

SELECT VESTRY.

See PLEADING, 2.

SERVICE OF PROCESS.

See PRACTICE, 3, 5.

SETTING ASIDE AND STAYING PROCEEDINGS.

See PRACTICE, 11, 24.

The Court will not stay an execution sued out at the instance of the defendant, after the allowance of a writ of error on a judgment of nonsuit, unless the plaintiff or his attorney point out some real error; and

the statute 1 Will. 4, c. 70, s. 8, does not alter the practice in this respect. *Keeling v. Austin*, 599

SET-OFF.

See PRACTICE, 14.

SHERIFF.

See PRACTICE, 4.

TROVER.

TRESPASS, 2.

SHIPPING.

See INSURANCE.

1. A ship was destined to a port which was notified to be under blockade:—*Held*, that the voyage was not illegal in its inception, as the vessel might have sailed for the purpose of inquiring whether the blockade existed. *Dalgleish v. Hodgson*, 407

2. *Quære*, whether the master of a vessel, having entered a port, is bound to proceed to the ultimate place for discharging her cargo on a Sunday? *Brereton v. Chapman*, 526

3. The defendant, the master of a vessel, agreed in writing to take out to the *Cape of Good Hope* a boat belonging to the plaintiff, not exceeding thirty feet in length and ten in width. The plaintiff tendered a boat within these dimensions, but it was a decked boat. The defendant refused to take it on board unless the deck were removed; and he offered to take it off and replace it on the arrival of the vessel at the *Cape*. This the plaintiff declined. The defendant proved that it was the custom to remove the decks of such boats, as they tended to impede the navigation of the vessel:—*Held*, that such evidence was properly received, and that the plaintiff could not recover against the de-

fendant in an action for a breach of the agreement, in not taking out the boat. *Haynes v. Halliday*, 572

SHIP-OWNER.

1. The plaintiff, as managing owner and ship's husband, expended a certain sum for the outfit of the vessel:—*Held*, that he might sue each of the other part-owners separately for his share of the expense. *Helme v. Smith*, 744

2. Although the part owner of a vessel can legally claim no other interest than that which appears on the face of the certificate of registry; yet, if he holds himself out as having a larger interest, he is responsible to that extent. *Ibid.*

STAMPS.

1. Where a house and lands were demised by lease for a term of years, at the yearly rent of 370*l.*, and there was a separate reservation of 50*l.* per annum for the use of the furniture and fixtures:—*Held*, that, under the statute 55 Geo. 3, c. 184, Sched. Part 1, tit. "Lease," the instrument required a 4*l.* stamp, such being the *ad valorem* duty on the aggregate amount of the rents reserved, as the furniture and fixtures were accessory to the house and lands. *Coster v. Cowling*, 399

2. By a mortgage deed, A. assigned certain barges to three of his creditors, as a security for three distinct debts due to each in his separate right. The aggregate amount only was stated in the deed:—*Held*, that an *ad valorem* stamp on such amount is sufficient. *Reed v. Wilmott*, 553

3. If copyhold premises are mortgaged with other property by separate deeds, the *ad valorem* duty must be charged upon the instrument relating to the other property. *Ibid.*

352 SUBSCRIBING WITNESS.

STATUTES.

James 1.

3, c. 8. Bail in error. 403

Charles 2.

16, c. 7, s. 3. Gaming. 303

Anne.

8, c. 14. Landlord and tenant. 266, 270

George 1.

12, c. 29. Practice. 153

George 2.

2, c. 23, s. 23. Attorney's bill. 66

11, c. 19. Landlord and tenant 19, 64

13, c. 19. } Gaming. 303
18, c. 34. }

George 3.

13, c. 63, s. 44. *Mandamus.* 185

26, c. 60, s. 17. } Ship's registry. 744
34, c. 68. }

38, c. 5, s. 21. Land-tax. 276

43, c. 46, s. 3. Costs. 701

c. 99, s. 13. Assessed taxes. 276

55, c. 184, Sched. Part 1, title "Leases." 399

55, c. 184, Sched. Part 1, title "Mortgage." 554

c. 192. Copyhold. 48

George 4.

6, c. 16 (Bankrupt), s. 45. 568

s. 52. 497

s. 67. } 568
s. 100. }

s. 121. 678

s. 126. 706

c. 50, s. 23. View. 255

c. 96. Bail in error. 403

7, c. 57, s. 61. Insolvent Debtor 12

9, c. 31, s. 23. Practice. 122

SUBSCRIBING WITNESS.

See WILL.

TRESPASS.

SURETY.

See GUARANTEE.

SURRENDER.

See COVENANT.

TAXATION.

See COSTS.

TRESPASS.

See PLEADING, 2, 6, 7.

1. The defendants, as overseers of the poor, distrained the goods of a party for poor's rates, under a warrant of a magistrate, such goods having been previously distrained for rent by the landlord, whose bailiff remained in possession. The magistrate, at the time of granting the warrant, told the overseers not to distrain any property which might have been previously distrained for rent:—*Held*, that the overseers were not entitled to the protection of the 6th section of the statute 24 Geo. 2, c. 44; and therefore, that the landlord might maintain trespass against them, without a previous demand of the perusal and copy of the warrant. *Key v. Grace*, 140

2. In an action of trespass for seizing the plaintiff's goods, the defendant justified under an execution. After seizure, but before the sale by the Sheriff, the execution was set aside by a rule of the Court of King's Bench, on the terms of the then defendant undertaking not to bring any action on account of such seizure. The rule for setting aside the execution was served on the plaintiff in the cause, and also upon the under-sheriff by the then defendant's attorney; notwithstanding which he proceeded to

VARIANCE.

sell, alleging, that, as he had not received any instructions from the attorney of the plaintiff in the cause, he was not warranted in staying proceedings:—*Held*, however, that as the execution was illegally sued out, the plaintiff in the cause was a wrongdoer, and that having set the Sheriff in motion by a writ illegally issued, he was answerable for the acts of the Sheriff in executing such writ, and, consequently, that he was liable in trespass brought by the defendant in the cause, for seizing and selling his goods under the execution. *Perkins v. Plympton*, 731

TROVER.

See ESTOPPEL.

1. A Sheriff's officer seized goods under a writ of *fiery facias*, part of which were afterwards packed up in two parcels, the one to satisfy the amount of the levy, the other to be sold to pay the Sheriff's poundage and incidental expenses of the levy. The execution was afterwards abandoned, but the goods which were to be appropriated to the payment of the poundage were sent to the Sheriff's officer, who afterwards received the amount of the poundage, and forwarded the parcel to the execution-creditor. The party against whom the execution was sued out, had previously committed an act of bankruptcy:—*Held*, that there was a sufficient conversion by the Sheriff to render him liable in trover to the assignee of the bankrupt. *Carlisle v. Garland*, 102

VARIANCE.

See WARRANTY, 1.

1. In an action by the indorsee against the acceptor of a bill of exchange, the declaration alleged that one G. J.

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drew the bill, which the defendant afterwards accepted: it was proved that the defendant accepted the bill in blank before the drawer had signed his name to it:—*Held*, to be no variance. *Molloy v. Delves*, 275

2. In an action on the case for an injury to the plaintiff's reversionary interest in a house, he averred in his declaration that the premises were in the occupation of one S. P. as tenant thereof to the plaintiff. It was proved that the house had been let to S. P. by a *cestui que trust*, to whom she had paid rent, the plaintiff being his trustee:—*Held* to be no variance, as the legal estate was in the plaintiff, and the *cestui que trust* was to be considered as his agent or bailiff. *Valance v. Savage*, 576

VENDOR AND PURCHASER.

1. In *assumpsit* by the purchaser of a reversionary interest of money in the funds, to recover back a deposit made by him on the sale of such property at an auction, on the ground that the vendor had failed to make out a good title, the only question for a Court of law to consider, is, whether, at the time of the sale, the vendor had a legal title to sell and convey to the purchaser. *Boyman v. Gutch*, 222

VESTRY.

See PLEADING, 2.

VIEW.

1. The costs of a view cannot be allowed to the party obtaining it, unless the names of the shewers are inserted in the writ of view. *Taylor v. Thompson*, 255

VOLUNTARY PAYMENT.

See BANKRUPT, 2.

WAGER.

See GAMING.

WARRANT OF ATTORNEY.

1. A warrant of attorney authorized *M. H.* to enter up judgment against the defendant; and by the defeazance it was stated, that the warrant of attorney was given to secure payment to *M. H.*, his heirs, executors, administrators, and assigns:—*Held*, that judgment could not be entered up by the executrix of *M. H.* after his death, as the warrant of attorney only authorized *M. H.* himself to enter up judgment. *Henshall v. Matthew*,

157

2. The Court allowed judgment to be entered up on an old warrant of attorney, upon an affidavit by the plaintiff's agent, that he saw the defendant execute the warrant of attorney, which was given to secure a sum of money due to the plaintiff, which remained due and unpaid. *Huthwaite v. Hood*,

321

WARRANTY.

1. The plaintiff declared, that, in consideration that he, at the request of the defendant, would deliver to the defendant a horse of the plaintiff in exchange for a mare of the defendant and 10*l.*, the defendant undertook that his mare was sound. Breach—that she was not sound. The plaintiff's witnesses proved that he did not warrant his horse to be sound, and that the defendant's mare was unsound. The defendant produced a receipt to the following effect, signed by the plaintiff (a horse dealer and illiterate man) with his mark:—"Received of the defendant 10*l.* for a colt, warranted sound in every respect." This receipt was given at the suggestion of the defendant's coachman,

WHARFINGER.

on the day following the bargain for the exchange, when the defendant sent him to pay the plaintiff 10*l.*:—*Held*, that the receipt was not conclusive to shew that the plaintiff had warranted his horse; and that it was properly left to the Jury to say, whether he had done so or not at the time of the original bargain for the exchange, or whether the warranty of the horse had not been introduced into the receipt by an after-thought of the defendant's coachman; and the Jury having found a verdict for the plaintiff, the Court refused to grant a new trial, which was applied for on the ground of a variance between the terms of the receipt and the consideration for the exchange of the horse and mare, as laid in the declaration. *Fairmaner v. Budd*,

534

2. If a horse have manifest and visible defects at the time of sale, they are not included in a general warranty. Where, therefore, on the sale of a race-horse, the seller told the purchaser that the horse was a crib-biter, and he also had a splint, which was apparent:—*Held*, that a warranty that the horse was sound, wind and limb, at the time of the sale, did not extend to those defects. And it having been left to the Jury to say whether the horse was fit for ordinary purposes:—*Held* to be improper, as the question for their consideration was, whether the horse was, at the time of the sale, sound wind and limb, saving those defects which were visible and known to the parties; and the Court directed a new trial. *Margelson v. Wright*,

606

WASTE.

See EVIDENCE, 9.

WHARFINGER.

See ESTOPPEL.

WILL.

WILL.

See EVIDENCE, 8.

EXECUTOR.

1. A will, by which the testator devised his real estates, was written and signed by himself previously to its being signed by any witness. He afterwards requested a female to sign her name in his presence, which she did, and he informed her that it was his will. Some time afterwards, when she was not present, the testator requested two other witnesses to sign their names in his presence, which they did, but the testator did not inform them that it was his will, nor did any of the witnesses see the testator's signature at the time of their attesting the will. Immediately above the names of the witnesses there were these words in the handwriting of the testator: "signed, sealed, published, and declared by T. W. (the testator), as his will, in the presence of us, who, at his request, and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses hereto:"—*Held*

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to be a sufficient attestation of the will. *Wright v. Wright*, 316

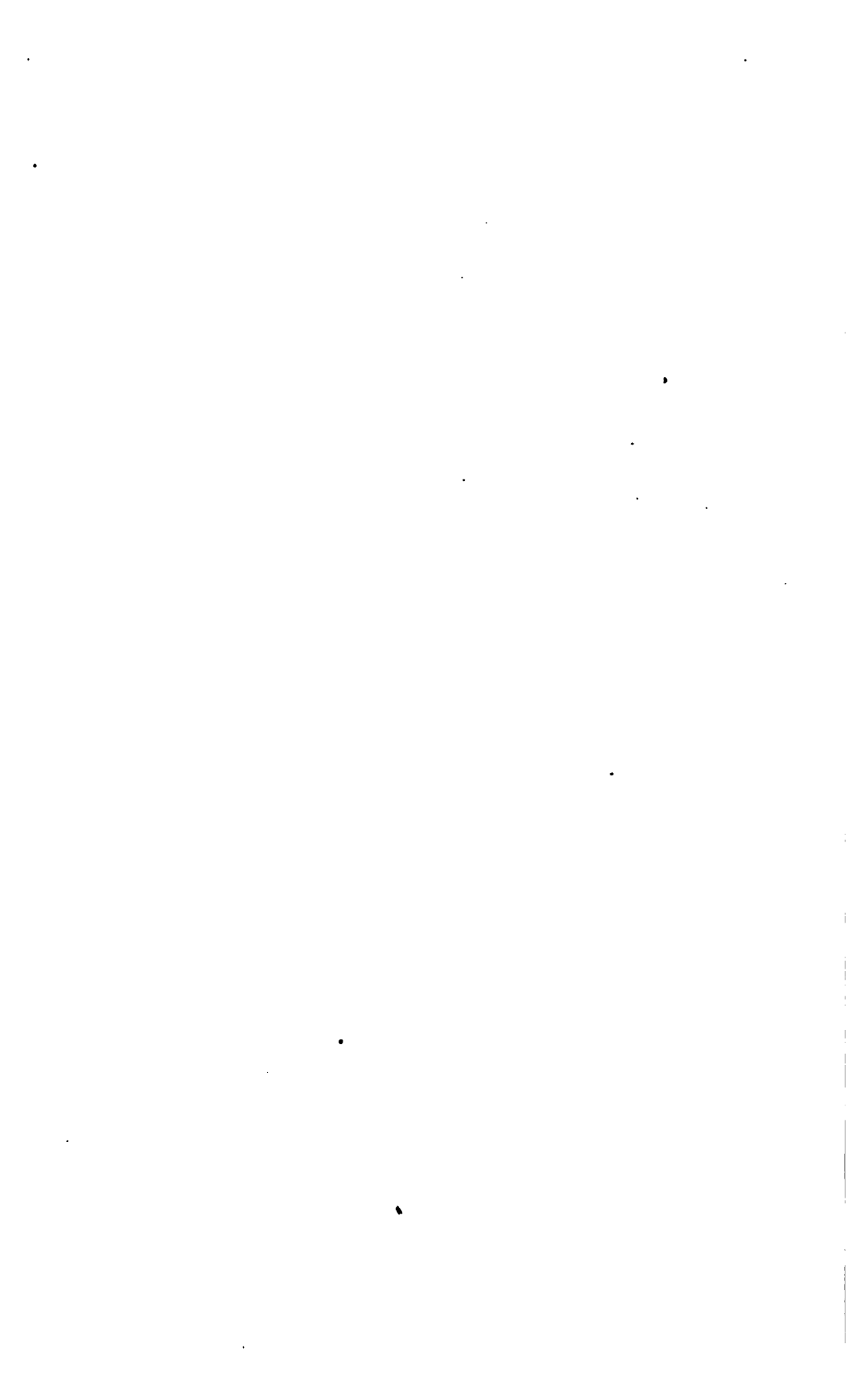
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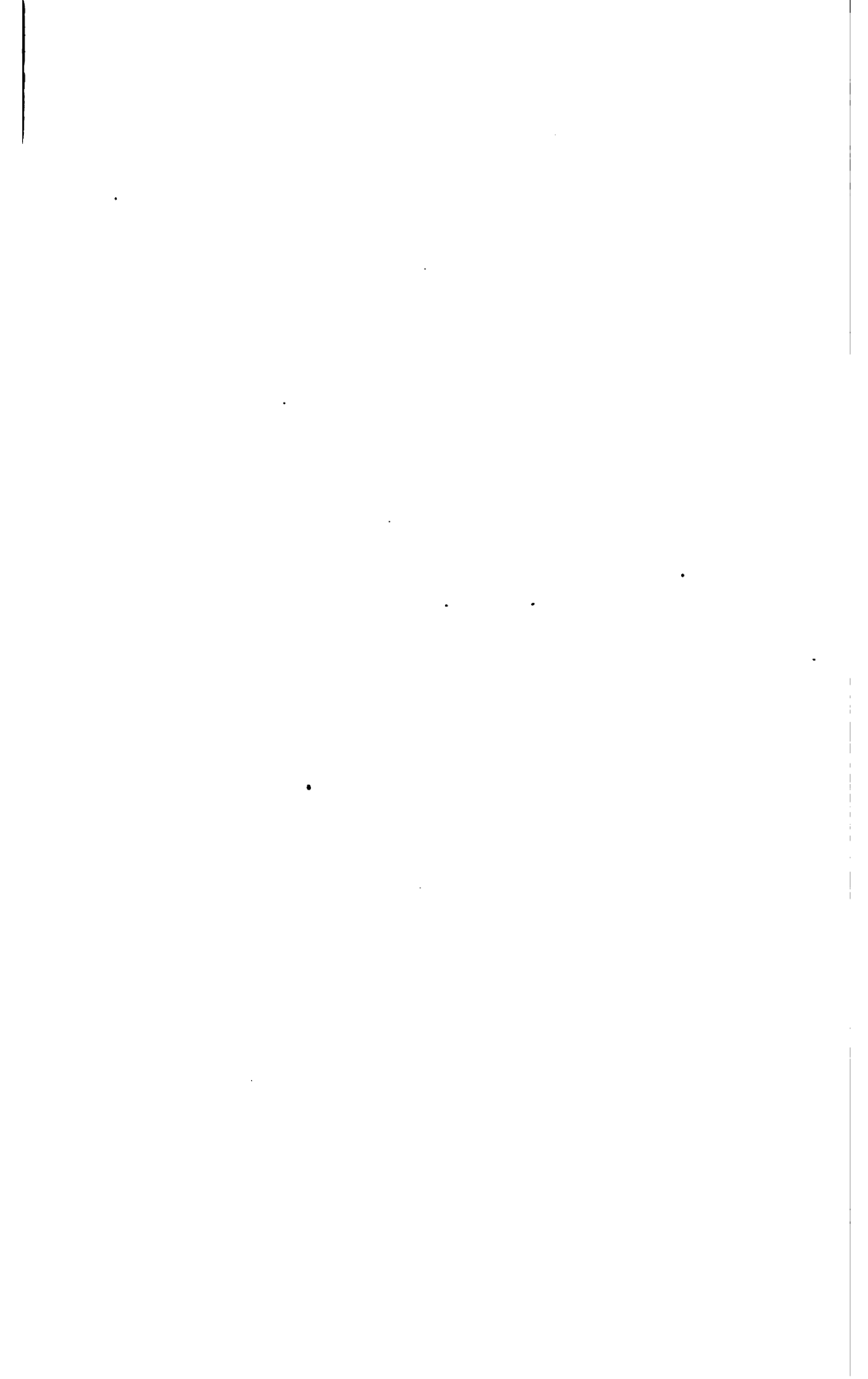
See EVIDENCE.

1. A foreigner and captain of a vessel, on being required to come to this country to give evidence for the plaintiffs in a particular cause, refused to do so unless he were compensated for his loss of time, which the plaintiffs' agent abroad promised him should be done:—*Held*, that he was entitled to have a reasonable sum allowed him by way of compensation for such loss. *Loneragan v. The Royal Exchange Assurance Company*, 805

WRIT OF ERROR.

1. The Court will not stay an execution sued out at the instance of the defendant, after the allowance of a writ of error on a judgment of nonsuit, unless the plaintiff or his attorney point out some real error; and the statute 1 W. 4, c. 70, s. 8, does not alter the practice in this respect. *Keeling v. Austin*, 599





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